Petition

81-1741

NO. _____

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS,
CLERK

Supreme Court Of The United States

October Term, 1981

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, RICHARD KRANTZ and TOM VAN HOWE ..... PETITIONERS

-versus-

JOHN TIM McCALL ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

Edgar A. Zingman
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel of Record for Petitioners

Of Counsel:

Sheryl G. Snyder
Raymond M. Burse
Kimberly K. Greene
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

PRINT MASTER, INC., 839 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 278-0341

QUESTIONS PRESENTED

If the Court were to grant this Petition and review the judgment below, five questions relating to Petitioners' freedom of the press, as guaranteed by the First Amendment, would be presented for review by the Court:

1. Whether the Court below erred in rejecting the doctrine of neutral reportage, and imposing the strict liability of the common law republisher rule, where, as an integral part of a newspaper story reporting a lawyer's unethical conduct, the newspaper accurately reported that a third party's assertions of more serious misconduct were unfounded.
2. Whether the Court below erred in holding that the newsworthiness of the subject matter of a newspaper article is not a defense in a case alleging false light invasion of privacy.
3. Whether the Court below erred in holding that, in a case alleging a false light invasion of privacy, the allegedly false portrayal can be actionable even if it is not sufficiently damaging to reputation to be defamatory.
4. Whether the Court below erred in applying the simple negligence standard of care to a limited public figure in a defamation action.
5. Whether the Court below erred in not placing upon the plaintiff the burden of proving the falsity of the allegedly defamatory publication.

Petitioners contend that this Court should issue the writ and answer each of these questions affirmatively.

TABLE OF CONTENTS

Page

Table of Authorities ..... iv-vii

Opinions Below ..... ix-x

Jurisdiction x

Constitutional Provisions Involved x

STATEMENT OF THE CASE 1-16

Statement of Facts 1-7

Statement of Proceedings Below 8-16

REASONS FOR GRANTING THE WRIT 16-29

I. By Rejecting the Doctrine of Neutral Reportage, the Judgment Below Is in Conflict with the Decisions of Several Federal Courts of Appeals and State Courts of Last Resort. 16-21

II. By Recognizing False Light Privacy as a Tort, the Judgment Below Decides an Important First Amendment Issue Which Has Not Been, But Should Be, Settled by this Court. 21-27

III. By Applying the Simple Negligence Standard to a Limited Public Figure, the Judgment Below Is In Conflict With Decisions of This Court. 27-29

IV. This Case Presents the Issue as to Which Certiorari Was Granted This Term in Wilson v. Scripps-Howard Broadcasting Co. 29

TABLE OF CONTENTS (Continued)

Page

CONCLUSION 30

APPENDICES

A. Opinion of the Supreme Court of Kentucky. 1a-37a

B. Opinion of the Court of Appeals of Kentucky. 38a-46a

C. Opinion of the Jefferson (Kentucky) Circuit Court. 47a-58a

D. Order of the Supreme Court of Kentucky Denying Petition for Rehearing. 59a

E. News article from The Louisville Times, March 17, 1976 ..... 60a-74a

TABLE OF AUTHORITIES

DECISIONS: Page

Campo Lindo for Dogs, Inc. v. *New York Post Corp.*, 65 A.D.2d 650, 409 N.Y.S.2d 453 (App.Div. 1978) . . 16

Cantrell v. *Forest City Pub. Co.*, 419 U.S. 245 (1974) 12

Chapadeau v. *Utica Observer, Inc.*, 341 N.E.2d 569 (N.Y. 1975) 29

Cibenko v. *Worth Pub. Inc.*, 510 F.Supp. 761 (D.N.J. 1981) 22

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 10, 12

Curtis Pub. Co. v. *Butts*, 388 U.S. 130 (1967) 18, 19, 20, 21, 29

Dickey v. *CBS, Inc.*, 583 F.2d 1221 (3rd Cir. 1978) 17, 19

Edwards v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), cert. den., 434 U.S. 1002 (1978) 14, 16, 17

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 12, 15, 17, 19-21, 26-29

Greenbelt Cooperative Pub. Ass'n. v. *Bresler*, 398 U.S. 6 (1970) 14, 19, 21

Hutchinson v. *Proxmire*, 443 U.S. 111 (1979) 20, 27

Krauss v. *Champaign News Gazette, Inc.*, 375 N.E.2d 1362 (Ill.App. 1978) 16

McCormack v. *Oklahoma Pub. Co.*, 613 P.2d 637 (Okl. 1980) 23

Medina v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1979) 16

TABLE OF AUTHORITIES (Continued)

DECISIONS: Page

New York Times Co. v. *Sullivan*,
376 U.S. 254 (1964) 10, 18, 28, 29

Novel v. *Garrison*,
338 F.Supp. 977 (N.D.Ill. 1971) 16

Peck v. *Tribune Co.*,
214 U.S. 185 (1909) 18

Pulverman v. *A.S. Abell Co.*,
228 F.2d 797 (4th Cir. 1956) 21

Rosenbloom v. *Metromedia, Inc.*,
403 U.S. 29 (1971) 12, 17, 27, 28

Suchomel v. *Suburban Life Newspapers, Inc.*,
84 Ill.App.2d 239, 228 N.E.2d 172 (1967), aff'd.,
240 N.E.2d 1 (1968) 16

Thuma v. *Hearst Corp.*,
340 F.Supp. 867 (D Nd. 1972) 16

Time, Inc. v. *Firestone*,
424 U.S. 448 (1976) 19, 27

Time, Inc. v. *Hill*,
385 U.S. 374 (1967) 10, 12, 13, 21, 27

Time, Inc. v. *Pape*,
401 U.S. 279 (1971) 21

Wilson v. *Scripps Howard Broadcasting Co.*,
642 F.2d 371 (6th Cir. 1981), cert. dis'd. under
Rule 53, 102 S.Ct. 500 (1982) 15, 29

Wolston v. *Reader's Digest Pub. Ass'n, Inc.*,
443 U.S. 157 (1979) 19-20, 27

Woolbright v. *Sun Communications, Inc.*,
480 S.W.2d 864 (Mo. 1974) 16

TABLE OF AUTHORITIES (Continued)

DECISIONS: Page

Uhl v. *CBS, Inc.*,
476 F.Supp. 1134 (W.D.Pa. 1979) 22

COMMENTARIES:

Bloustein, "Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" 46 Tex. L.Rev. 611 (1968) 22

Bloustein, "The First Amendment and Privacy: The Supreme Court Justice and the Philosopher," 28 Rutgers L.Rev. 41 (1974) 12-13

Hill, "Defamation and Privacy Under the First Amendment," 76 Colum. L.Rev. 1205 (1976) 12

Kalven, "Privacy in Tort Law — Were Warren and Brandeis Wrong?," 31 Law and Contemporary Problems 326 (1966) 22, 25

Lehmann, "Triangulating the Limits of the Tort of Invasion of Privacy," 3 Hastings Const. L.Q. 543 (1976) 12

Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Cal. L.Rev. 935 (1968) 22, 24

Phillips, "Defamation, Invasion of Privacy, and the Constitutional Standard of Care," 16 Santa Clara L.Rev. 77 (1975) 12

Prosser, "Privacy," 48 Cal. L.Rev. 383 (1960) 23, 24

Sowle, "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report," 54 N.Y.U.L. Rev. 469 (1969) 16

TABLE OF AUTHORITIES (Continued)

COMMENTARIES: Page

Wade, "Defamation and the Right of Privacy," 15 Vand. L.Rev. 1093 (1962) 23

Wanat, "Falsehoods, the Right of Privacy and the Constitutional Privilege: Time, Inc. v. Hill, Revisited," 8 Memphis St. U. L.Rev. 33 (1977) 12

Warren and Brandeis, "The Right to Privacy," 4 Harv. L.Rev. 193 (1890) 22

Comment, "Constitutional Privilege to Republish Defamation," 77 Colum. L.Rev. 1266 (1977) 16

Comment, "Privacy: The Search for a Standard," 11 Wake F. L.Rev. 659 (1975) 13

Note, "False Light — Invasion of Privacy?," 15 Tulsa L.Rev. 113 (1979) 13, 25

Note, "Protecting Public Debate: A Proposed Constitutional Privilege of Accurate Republication," 58 Tex. L.Rev. 623 (1980) 16

TEXTBOOKS:

Sack, *Libel, Slander and Related Problems*, (1980) ... 26

RESTATEMENT OF LAW:

Restatement (2nd) of Torts, §652E, Comment a (1976) 22

Restatement (2nd) of Torts, §652E, Comment b (1976) 24

NO. _____

Supreme Court Of The United States

October Term, 1981

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, RICHARD KRANTZ and TOM VAN HOWE ..... PETITIONERS

-versus-

JOHN TIM McCALL ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Kentucky entered in this proceeding on October 13, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is officially reported at 623 S.W.2d 882, and appears as Appendix A hereto.

The opinion of the Court of Appeals of Kentucky is not officially reported. *See,* Rule 76.28(4), Ky.R.Civ.P. The

---

[1] Pursuant to Rule 21.1(b), counsel states that a list of all parties to the proceeding in the Court below is unnecessary since the caption of the case in this Court, including the caption of this Petition, contains the names of all parties. A listing of all corporate affiliates of Courier-Journal and Louisville Times Company was filed with counsel's Entry of Appearance pursuant to Rule 28.1.

opinion is reported unofficially at 6 Media L.Rptr. 1112, and appears as Appendix B hereto.

The opinion of the Jefferson Circuit Court is not officially reported. It is reported unofficially at 4 Media L.Rptr. 2337, and appears as Appendix C hereto.

The order of the Supreme Court of Kentucky denyng these Petitioners' petition for rehearing is unreported, and appears as Appendix D hereto.

JURISDICTION

The judgment of the Supreme Court of Kentucky sought to be reviewed was entered on October 13, 1981. A timely petition for rehearing was filed, and was denied by the Supreme Court of Kentucky on December 15, 1981. This Petition is filed within ninety (90) days of the latter date pursuant to 28 U.S.C. §2101(c).

This Court has jurisdiction to review the judgment of the Supreme Court of Kentucky by writ of certiorari pursuant to the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The provision of the Constitution of the United States which is involved in this case is the First Amendment thereto, as applied to the States through the Due Process Clause of the Fourteenth Amendment; which provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

There are no treaties, statutes, ordinances or regulations involved in the dispositive issues in this case.

STATEMENT OF THE CASE

This is an action involving defamation and false light invasion of privacy. The plaintiff (Respondent) is a practicing attorney. The defendants (Petitioners) are the publisher of a daily newspaper in Louisville, Kentucky, and two of its reporters.

The newspaper article giving rise to the litigation reported a meeting between the plaintiff attorney and one of his clients which was secretly taperecorded by the client without the attorney's knowledge. The newspaper reported that the secret taperecording revealed that, during this meeting, the attorney committed three serious violations of the Code of Professional Responsibility. This portion of the story is alleged to have tortiously placed Respondent before the public in a false light.

The newspaper also explained that it had secretly taperecorded the meeting in order to investigate the client's allegation that the attorney (Respondent) had offerred to "fix" her pending indictment, but that the taperecording failed to corroborate this assertion. Respondent's complaint alleged this portion of the news story constituted actionable defamation because, Respondent contended, the news media is strictly liable when it republishes the false assertions of third parties, even if those assertions are accurately reported to have been disproven.

The Supreme Court of Kentucky upheld both these portions of the complaint, necessitating this petition for a writ of certiorari.[2]

Statement Of Facts

Petitioners Tom Van Howe and Richard Krantz are news reporters. They were investigating alleged harass-

---

[2] The Complaint and two Amended Complaints alleged additional claims for relief, but none are germane to this Petition.

ment of the Louisville drug community by narcotics agents and other police officials when Kristie Frazier told them "that if I had $10,000.00 that I would not have to go to jail" [Frazier Depo., p. 5]. She told the reporters that the Respondent, McCall, had offered to represent her by ordinary means for $1,500.00; but McCall had told her that for $10,000.00 he would *guarantee* Frazier that she would not have to serve any time in jail [Frazier Depo., pp. 6, 8]. Frazier understood McCall's offer of a guarantee to mean he could "fix" her case. "You would think that, too, would you not? Anybody would, just about" [Frazier Depo., p. 33].

Frazier's attorney of record was Richard Nash, not McCall. Nash had told Frazier that her situation was hopeless and she should plea bargain. A friend then told Frazier that McCall could fix her case, so she made an appointment with McCall for that purpose [Appendix C., p. 52a, *infra*]. At Frazier's first meeting with McCall, he told her he could not help her for a customary fee, but that for $10,000 "he would guarantee she would walk in court and walk back out." *Id.*

During Frazier's first meeting with McCall, Frazier had been accompanied by her sister, Carolyn Shelburne. Frazier and Shelburne were questioned separately by the reporters, and both furnished affidavits to the reporters asserting they believed that McCall had offered to "fix" Frazier's case for $10,000.00 [Frazier Depo., pp. 32-33, 61, 117-118; Record, pp. 134-37].

The reporters knew that Frazier's attorney of record, Richard Nash, had told Frazier she should plea bargain. Krantz and Van Howe therefore concluded that McCall's "guarantee" meant that McCall intended to offer a bribe to the judge presiding over Frazier's case and that McCall expected the judge to accept the bribe. The reporters naturally felt that these allegations of corruption in both the judicial system and the legal profession dealt with news of great public concern.

However, the reporters were unwilling to publish a story based solely upon Frazier's and Shelburne's affidavits. Instead, the reporters wanted to carefully investigate the allegations to see if they could be verified or dispelled. Accordingly, it was arranged for Frazier to return to McCall's office with a tape recorder secreted in her purse and engage McCall in another conversation relating to his representing her while she recorded that conversation without McCall's knowledge or consent. Krantz and Van Howe wanted the recording for corroboration and verification of Frazier's and Shelburne's allegations. Frazier wanted to prove the accuracy of her statements in the hope the Petitioners would give her the $10,000 necessary to have McCall guarantee her freedom [Frazier Depo., pp. 11-13, 52-53; 75].

On March 10, 1976, Frazier again visited McCall in his office and recorded their conversation [Record, 76-98]. In that conversation, McCall declared there would be no "fix." However, McCall did: [1] give Frazier a money-back guarantee that she would not go to prison; [2] state that Frazier should not worry, since McCall was going fishing for the entire weekend with the judge who was presiding over her case; and [3] tell Frazier that the judge and prosecutor would be cooperative when McCall told them of the size of his fee in Frazier's case *Id.*

The secret taperecording demonstrates that McCall again told Frazier that his fee for handling the case in the normal way would be $1,500, "no guarantees, no nothing" [Record, 78]. However, McCall pledged that if Frazier would pay him a $10,000 fee, he would give her a money-back guarantee that she would not be incarcerated:

> MR. McCALL: . . . if you don't go to jail or the penitentiary, then I'll charge you ten grand. If you do, then I won't charge you, I'll charge you a thousand dollars for my trouble. But, in other words I'm

> guaranteeing you for nine grand more that you won't, that nothing will happen to you [Record, 88].[3]

McCall was adamant that Ms. Frazier could not discuss this money-back guarantee with anyone:

> MS. FRAZIER: You don't want me to tell Nash?
>
> MR. McCALL: No, if I make that agreement with you to represent you, for 10 grand, you understand (garbled) if it comes back to me that either the judge finds out about it or any talk I would have with him about my fees — in other words if Nash finds out about your paying me ten grand, if he even found out about (garbled) then the deal is off. I'll just tell you for sure, you understand?
>
> MS. FRAZIER: Okay, if anybody —
>
> MR. McCALL: I don't want any police officer, I don't want anybody to know except me and you. . . .
>
> . . . .
>
> MR. McCALL: See I don't want anybody, I'm just telling you, if anybody knows about our fuckin' business it'll ball them. If Nash knows it'll blow [Record, 90-91, 93].

McCall then explained to Frazier how the enormously increased fee he had demanded enabled him to "guarantee" that she would not be incarcerated:

> MR. McCALL: . . . I'm going to tell you, believe it or not. The only way I could straighten this out is through legal recourse and the fact that I can tell him that I'm making a substantial fee, and the prosecutor will be sympathetic to me, and he will too.
>
> MS. FRAZIER: Well, by you telling them that you're making a substantial fee they will help you.

---

[3] The quotations in this Brief are from the newspaper reporters' transcript, which is in the Record on Appeal.

> MR. McCALL: (garbled) They will help me and that will help you [Record, 96].

During this conversation, McCall became aware that Frazier was scheduled to appear in court the following Monday, but McCall assured Frazier that he was going fishing with the presiding judge that weekend and could use his personal relationship with the judge to remedy any such problem:

> MR. McCALL: Do you mean it's scheduled for trial Monday?
>
> MS. FRAZIER: You've got to do something — that's what I mean, if I could get you the money Friday —
>
> MR. McCALL: Hey, don't worry about it. I'm going fishing with Hayes Friday. All weekend.
>
> MS. FRAZIER: Oh! (giggle)
>
> . . . .
>
> MS. FRAZIER: You're going to spend the weekend with Hayes and butter him up?
>
> MR. McCALL: Don't say anything.
>
> MS. FRAZIER: Okay I won't [Record, 92, 96].

This shocking conversation brought about the March 17, 1976, news article in *The Louisville Times* which is the subject of McCall's complaint. [The full text of the news article is Appendix E hereto.]

The news article accurately reported there was no evidence that McCall actually offered to fix the case. The newsarticle also accurately reported that McCall's improper propositions to Frazier contravened the Code of Professional Responsibility in three respects:

First, McCall had conditioned his fee in a criminal case upon the outcome of the case, in violation of DR 2-106(C).[4]

Second, McCall had implied he could influence Frazier's case through his personal relationship with a judge, in violation of DR 9-101(C) and DR 7-110(B).[5].

Third, McCall had clearly indicated he would exert his "best efforts" for Frazier only if she paid him a fee ten times his usual rate, a violation of DR 2-106(A)-(B) and DR 7-101(A).

These ethical violations by McCall were the gist of the story. *See*, Appendix E, *infra*. Significantly, McCall has never requested a retraction [McCall Depo., p. 143]. In fact, McCall does not contend that the newspaper itself made any false and defamatory statements about him at all.[6] He thus concedes the accuracy of the Kentucky Court of Appeals' conclusion that:

> *The Times* carefully and unequivocally reported that there was no evidence of any illegality and that McCall had repeatedly told Frazier that her case would not be 'fixed,' but would be resolved through legal processes [Appendix B, p. 47a, *infra*].

McCall's defamation claim contends only that the newspaper is strictly liable for republishing Kristie

---

[4] "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." DR 2-106(C).

[5] "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." DR 9-101(C).

"In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending . . . ." DR 7-101(B).

[6] McCall does claim that the portions of the newsarticle concerning his ethical violations placed him in an unreasonably false light before the public, an issue discussed below.

Frazier's original allegation that he had offered to fix her case [McCall's Brief to the Supreme Court of Kentucky, pp. 14-15].

After fully reporting the taperecorded conversation, the ethical infractions involved and the fact no illegality was involved, *The Times* explained to its readers how and why the conversation had been taperecorded. This portion of the article appeared on page 18 of the newspaper and constituted paragrahs 36 through 52 of the story. *See,* Appendix E, pp. 69a-72a, *infra.*

In order to fully explain why *The Times* undertook the investigation, which involved *The Times'* participation in taperecording the March 10 McCall/Frazier conversation, it was necessary to report the allegations of a fix which Frazier and Shelburne had made when interviewed and had subsequently sworn to in affidavits. When these statements were reported, *The Times* hastened to repeat in the same paragraph that *The Times'* investigation found no evidence to support Frazier's assertions. It is this one, background paragraph in the news article upon which McCall bottoms his libel claim. The paragraph read as follows:

> The Times requested that Ms. Frazier tape record the conversation because the newspaper was attempting to investigate her allegations that McCall had offered to "fix" her case for $10,000. However, the Times found no indication of any "fix" [Tr. 35].

McCall's sole contention as to libel concedes arguendo that the newspaper's disclaimer was understood by the average reader to mean that the newspaper's investigation had determined Frazier's assertion to be incorrect, and argues that the newspaper is nevertheless strictly liable for "republishing" Frazier's statement. [See McCall's Brief to the Supreme Court of Kentucky, pp. 14-15]. As is discussed below, the Supreme Court of Kentucky agreed with this contention.

Statements Of Proceedings Below

In his Amended Complaint, McCall relied not only upon his claim of strict liability for republishing Frazier's statement, but also upon a claim of false light invasion of privacy. McCall alleged that the gist of the story, which related to the ethical infractions he committed during his taperecorded conversation with Frazier, had placed him in false light before the public. The factual basis of this claim is curious, at best, since the Amended Complaint expressly conceded that the news article was substantially true in every material respect and alleged only that the phraseology chosen by the reporters, and the arrangement of those true facts by the editors, was "unfair" because it allegedly made McCall's unethical actions appear to be worse than they really were. Count 3 of the Amended Complaint begins with the following concession:

> During the course of his conversation with Kristie Frazier, the Plaintiff said certain things or used certain words and phrases which, had they been spoken to one occupying the relationship she pretended to occupy, would have been either violative of the letter or spirit of the Attorney's Code of Professional Responsibility; or, which regardless of whether the statements, words and phrases should be characterized, were things he should not have said and were of a nature which, if publicized fairly, would have caused some damage to his reputation and some personal embarrassment.

Count 3 then asserts that this allegedly unfair reporting made it appear to the average reader that McCall was dishonest, had been "willing to engage in the crime of bribery," and was a "dishonest, . . . totally disreputable person." The Amended Complaint alleged this inference placed him in a false light before the public:

16. The result of the Defendants' so writing their stories was to make it appear to the average reader that the Plaintiff was guilty of conduct of a far more serious nature than he was and/or would be considered by the average reader had the Defendants' story or stories been written in a fair and reasonable manner.

17. The Defendants accomplished what has been described in the preceding two paragraphs by a number of different means, some of which are as follows:

[a] failing to report some of the things which were said during the course of the Plaintiff's conversation with Kristie Frazier, which things would have mitigated the effect of the Plaintiff's actual words on the average reader;

[b] the placement and length of the news story;

[c] unfair and incorrect statements about what actually transpired;

[d] the Defendants' use of captions and headlines for its story.

. . . .

19. The Defendants' distorted reporting of the Plaintiff's conversation with Kristie Frazier was wrongful and caused the Plaintiff mental suffering and damage to his reputation far beyond that which would have been caused by fair and reasonable news stories. . . .

There can be no question that the subject matter of the news article was of legitimate interest to the public. Few things are of greater public importance than the integrity of the criminal justice system and the ethics of members of the bar. Allegations that a lawyer has breached the Code of Professional Responsibility, and allegations that a pending criminal case can be "fixed" for $10,000.00, are of grave public concern. Consequently, Petitioners moved for summary judgment, arguing that McCall cannot recover under a

false light theory of invasion of privacy unless he can show that the news article was published with "reckless disregard for the truth" as that phrase has been construed in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny, and applied to false light cases in *Time, Inc.* v. *Hill*, 17 L.Ed.2d 456 (1967); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975).

Petitioners also contended that McCall's false light claims actually complained only of word choice and editorial judgment; that McCall had alleged only that the reporters did not report everything he would like for them to have reported; and that Count 3, in its words, posited only "damage to McCall's reputation far beyond that which would have been caused by fair and reasonable news stories. . ." Petitioners thus contended McCall's false light allegations obviously fall far short of the standard mandated by the First Amendment and established in such decisions of this Court as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).[7]

McCall's response to the contentions was to jettison Count 3, expressly abandoning any reliance upon false light privacy [Record, 347, 372]. Indeed, in the Court of Appeals, McCall chastised the Circuit Court for even ruling on the false light claims, saying:

> The tort of invasion of privacy by false light portrayal had been pleaded *in addition* to the tort of LIBEL. But in briefing our opposition to summary judgment, the Court was expressly told *twice* [T.R. 347 and 372] that although we felt the theory was a viable one we

---

[7] "A newspaper is more than a passive receptical or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*, 418 U.S. at 258.

> were not relying on it, but that we were relying simply on LIBEL. . . [McCall's Brief to the Kentucky Court of Appeals, p. 2 (emphasis original)].

McCall then proceeded to make clear to the Court of Appeals that false light was no longer an issue in the case:

> Notwithstanding the emphasis given to 'false light' in the Circuit Court's opinion, this Court should clearly understand we have come here not to argue about portrayal in a false light, but to challenge the propriety of summary dismissal of the claims of *LIBEL* and INVASION OF PRIVACY BY INTRUSION/TRESPASS. [*Id.*, at p. 3 (emphasis original)].

In the Kentucky Supreme Court, false light was not even mentioned, yet the Court decided to dispose of the case in large part on that issue. As the late Mr. Justice Lukowski said in his concurring opinion in this case:

> Unfortunately, the majority paints with far too broad a brush. Among other things, they conjure up the question of a violation of the right of privacy through placing a person in a false light when that issue was never presented nor argued to either the Court of Appeals or this Court. Their fervor to decide an abstract question of law without the framework of a concrete case and the advantage of briefing and argument escapes me.

623 S.W.2d at 889.

In the majority opinion of the Supreme Court of Kentucky, the tort of invasion of privacy by false light was recognized in Kentucky for the first time. The Court squarely adopted as the law of Kentucky the Restatement (2nd) of Torts, §652A(2)(d) and §652E (1976). The Court then went on to hold that, in Kentucky, false light invasion of privacy may exist alongside the tort of defamation, holding:

> Much has been written as to the similarity of 'false light' and defamation. The purpose of a false light action is to protect the individual in not being made to appear before the public in an unreasonably objectionable false light and otherwise as he is. *To sustain this action, the person need not be defamed.* It is sufficient that the publicity attributed to him characteristics, conduct or beliefs that are false, and that he is placed before the public in a false position.

623 S.W.2d at 888, n.9 (Court's emphasis).[8]

The lower court's disposition of McCall's defamation claim is equally incongruous. In their motion to the trial court for summary judgment, Petitioners argued that McCall is a public figure for the limited purpose of this news article concerning his unethical conduct. Petitioners also argued that this Court had irrevocably abolished strict liability for defamation in *Gertz* v. *Robert Welch, Inc., supra.* Petitioners contended that, in the context of the neutral reportage of events as important as corruption of the criminal justice system, the *Gertz* requirement of fault required more than the accurate repetition of a third party's statement accompanied by an accurate report the statement has been disproven.

---

[8] As to false light, the Kentucky Supreme Court also held that this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), overruling *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), vitiated the rationale of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). *See*, 623 S.W.2d, at 888. The Kentucky Supreme Court noted that this issue is open in this Court. *See, Cantrell* v. *Forest City Pub. Co.*, 419 U.S. 245, 250-51 (1974); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490-91 (1975). *See also*, Hill, "Defamation and Privacy Under the First Amendment," 76 Colum. L.Rev. 1205, 1274 (1976); Wanat, "Falsehoods, the Right of Privacy and the Constitutional Privilege: Time, Inc. v. Hill Revisited," 8 Memphis St. U. Rev. 33 (1977); Lehmann, "Triangulating the Limits of the Tort of Invasion of Privacy" 3 Hastings Const. L.Q. 543, 594 (1976); Phillips, "Defamation, Invasion of Privacy, and the Constitutional Standard of Care," 16 Santa Clara L.Rev. 77, 79 (1975); Bloustein, "The First Amendment and Privacy: The Supreme Court Justice and Philosopher,"

(*continued on page 13*)

The trial court initially denied Petitioners' motions to dismiss the Complaint and the Amended Complaint. Extensive discovery was completed and, on McCall's motion, trial was set for March 20, 1979. One week prior to trial, the Circuit Court granted Petitioners' motion for summary judgment in all respects [See Appendix C], and McCall appealed to the Court of Appeals of Kentucky.

The Court of Appeals affirmed the summary judgment for Petitioners in an opinion adopting the doctrine of neutral reportage:

> Although as an attorney McCall is not a public figure, and thus proof of malice is not required, this Court must still direct its attention to the articles in their entirety. "It is a fundamental principle in the law of libel and slander that the defamatory matter complained of should be construed as a whole. . . ." *Commercial Tribune Publishing Co.* v. *Haines*, 228 Ky. 483, 15 S.W.2d 306, 307 (1929).
>
> The March 17 article dealt with the ethical improprieties committed by McCall during his conversation with Frazier on March 10. The *Times* carefully and inequivocally reported that there was no evidence of any illegality and that McCall had repeatedly told Frazier that her case would not be "fixed," but would be resolved through legal processes. After reporting the tape-recorded conversation, the ethical infractions involved, and the fact that no illegality was involved, the *Times* explained to its readers how and why the conversation had been recorded.
>
> * * *

(footnote 8, continued from page 12)
28 Rutgers L.Rev. 41, 91 (1974); Note, "False Light: Invasion of Privacy?," 15 Tulsa L.Rev. 113, 132-33 (1979); Comment, "Privacy: The Search for a Standard," 11 Wake F.L.Rev. 659, 664 (1975). The Kentucky Supreme Court stated that it "believed[d] the desirable standard of fault [in false light cases] is that of simple negligence which we have adopted in this opinion for libel cases." 623 S.W.2d, at 888. However, the Court correctly held that it was required by stare decisis to follow the precedent of *Time, Inc.* v. *Hill*, *supra* until overruled by this Court. *Id.* Accordingly, this issue is not presented by this Petition.

> McCall argues that a speaker or publisher may not avoid liability for his defamatory statements or publications merely by attributing them to other persons and disclaiming any personal belief in the truth of the assertions. While we agree that the press should not have an absolute constitutional privilege and immunity from libel for any method of gathering information and for any report it makes, we must recognize that the free flow of truthful information is at the heart of the First Amendment. *See, Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir.) *cert. den.*, 434 U.S. 1002 (1977); *Greenbelt Cooperative Pub. Assn.* v. *Bresler*, 398 U.S. 6 (1970). Balancing the conflicting interests of the individual against the interests of the free press and the public in these situations is often a difficult task. We must conclude, however, that these articles are accurate and truthful reports of what occurred and that the newspaper has not charged McCall with offering to "fix" a case.

The Supreme Court of Kentucky then granted McCall's motion for discretionary review of the Court of Appeals' affirmance. McCall's brief to the Kentucky Supreme Court sharpened the focus on his claim of strict liability for republication. In the lower courts McCall had argued alternatively that the average reader might have believed that the newspaper had itself accused McCall of offering to fix Frazier's case. However, to avoid the persuasive rationale of the Court of Appeals' holding (quoted *supra*), McCall now made clear his argument was limited to strict liability for republication. In his brief, he said:

> It is true that by reading the entire article one can tell that the Defendants themselves were not making the charge — but we can tell that from the words that are in the same paragraph as the offensive material. For, in that paragraph it is made clear that Frazier — not the newspaper — had alleged McCall offered to fix the case, and that the Defendants had found no indication of a fix. So, we do not need the whole article to tell us

what the one paragraph means [McCall's Brief to the Supreme Court of Kentucky, p. 25].[9]

The Supreme Court of Kentucky reversed the Court of Appeals and forthrightly rejected the constitutional privilege of neutral reportage because "[t]his doctrine has not been approved by the Supreme Court of the United States...." The Court reasoned that, under *Gertz*, the appropriate standard of fault is "simple negligence" and refused to recognize that the holding in *Gertz* applied to a situation where the newspaper publisher was simply accurately reporting the statement made by a third party.

Finally, the concurring opinion of the late Justice Lukowski forthrightly held "that *Gertz* and its phylogeny [sic] impose the burden of proof and risk of non-persuasion on the issue of falsity of the defamatory statement on the plaintiff." 623 S.W.2d, at 895, citing *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981). The majority opinion, however, stated the elements of the tort of defamation in Kentucky and expressly omitted any burden upon the plaintiff to prove falsity. 623 S.W.2d, at 884. These Petitioners then filed a petition for rehearing, asking the Supreme Court of Kentucky to clarify whether the burden of proving falsity in a defamation action is upon the plaintiff; asking the Court to reconsider its application of the simple negligence standard to the neutral reportage context, and asking the Court to reconsider its recognition of the tort of false light invasion of privacy without the benefit of briefing or oral argument.

---

[9] McCall also altered his stance as to his own misconduct. In the Circuit Court and Court of Appeals, McCall had profusely apologized to the Court for his conduct in the March 10 conversation with Frazier [Appellant's Brief to the Court of Appeals, p. 9; Record, 160-62]. However, in the Kentucky Supreme Court, McCall decided that the better defense is to attack. Thus, he asserted that Respondents "inveigled McCall into agreeing to a refund" [Movant's Brief, p. 32] and that he would not have considered accepting a contingent fee but for a chivalrous concern for Ms. Frazier's welfare [Movant's Brief, pp. 11-12]. His prior apologies, together with the recording of the McCall/Frazier conversation, prove this benign characterization of that conversation is preposterous.

The Supreme Court of Kentucky denied the petition for rehearing without opinion, and this petition for certiorari followed.[10]

REASONS FOR GRANTING THE WRIT

I. BY REJECTING THE DOCTRINE OF NEUTRAL REPORTAGE, THE JUDGMENT BELOW IS IN CONFLICT WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT.

Whether the doctrine of neutral reportage is compatible with this Court's recent decisions in defamation cases is currently one of the most discussed issues in media law.[11] In this case, the Kentucky Court of Appeals agreed with several other appellate courts[12] and recognized the doc-

---

[10] McCall also asserted that Frazier's taperecording their conversation without his consent constituted an invasion of privacy by wrongful intrusion. The trial court had also granted summary judgment on this issue, and the Court of Appeals of Kentucky expressly affirmed that judgment [Appendix B]. The Supreme Court of Kentucky affirmed that ruling sub silentio and denied McCall's cross-petition for rehearing as to that issue [Appendices A and D]. Accordingly, that issue is not before this Court, the trial court's judgment for Petitioners being the law of the case.

[11] *See, e.g.*, Sowle, "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report," 54 N.Y.U.L. Rev. 469 (1979); Note, "Protecting Public Debate: A Proposed Constitutional Privilege of Accurate Republication," 58 Tex. L.Rev. 623 (1980); Comment, "Constitutional Privilege to Republish Defamation," 77 Colum. L.Rev. 1266 (1977).

[12] The leading case adopting neutral reportage is *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir. 1977), *cert. den.*, 434 U.S. 1002 (1978). *Accord, Krauss* v. *Champaign News Gazette, Inc.*, 375 N.E.2d 1362 (Ill.App. 1978); *Campo Lindo for Dogs, Inc.* v. *New York Post Corp.*, 65 A.D.2d 650, 409 N.Y.S.2d 453 (App. Div. 1976). *See also, Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971); *Thuma* v. *Hearst Corp.*, 340 F.Supp. 867 (D. Md. 1972); *Novel* v. *Garrison*, 338 F.Supp. 977 (N.D. Ill. 1971); *Woolbright* v. *Sun Communications, Inc.*, 480 S.W.2d 864 (Mo. 1974); *Suchomel* v. *Suburban Life Newspapers, Inc.*, 84 Ill. App. 2d 239, 228 N.E.2d 172 (1967), *aff'd.*, 240 N.E.2d 1 (1968).

trine. However, the Kentucky Supreme Court agreed with still other appellate courts[13] and decided to "reject the doctrine." 623 S.W.2d, at 887. This obvious conflict among the decisions of several federal courts of appeals and state courts of last resort should be resolved by this Court in this case.

In *Dickey* and in this case, the courts erroneously assumed that the doctrine of neutral reportage rests upon the subject-matter (newsworthiness) test of *Rosenbloom* v. *Metromedia, Inc., supra*; and thus erroneously reasoned that the adoption of the status test in *Gertz* v. *Robert Welch, Inc., supra*, mandates rejection of neutral reportage. But that overlooks *Gertz's* abolition of the common law rule of strict liability and the consequent imposition of the fault requirement. Under *Gertz*, the States can no longer hold publishers strictly liable for republishing a third party's statements; they must apply a standard of care which inquires whether the neutral reportage of the third party's statement constituted "fault."

In this case, for example, McCall did not allege that Petitioners accused him of agreeing to fix a case. In his brief, McCall conceded that, in the news article:

> "It is made clear that Frazier — not the newspaper — had alleged that McCall offered to fix the case, and that the Defendant had found no indication of a fix" [McCall's Brief to the Kentucky Supreme Court, p. 25].

Thus, there is no dispute in this case that Petitioners exercised great care in checking on the truth or falsity of Frazier's allegation that McCall had offered to fix her case. Indeed, the gravamen of McCall's complaint is that, hav-

---

[13] The leading case rejecting neutral reportage is *Dickey* v. *CBS, Inc.*, 583 F.2d 1221 (3rd Cir. 1978), in which the Third Circuit expressly disagreed with the Second Circuit's decision in *Aububon Society, supra*. In this case, the Kentucky Supreme Court expressly followed *Dickey* and expressly rejected *Audubon Society*. 623 S.W.2d, at 886-87, n.5.

ing ascertained that Frazier's allegation was false, the newspaper nevertheless published it. Relying exclusively upon decisions predating *New York Times Co.* v. *Sullivan, supra*, McCall contended that whenever a newspaper republishes a third party's allegations the sole inquiry is whether the third party's allegation is true, and it is irrelevant that the newspaper itself said the allegation is not true. In essence, the newspaper's own accurate reporting that the allegation is false convicts it of libel, rather than providing a complete defense as is the ordinary rule. Clearly McCall was contending for a rule of strict liability, in contravention of *Gertz*.

Before *Sullivan*, the publisher or republisher of a defamatory statement was strictly liable unless he could either prove the truth of the matter or bring himself within a particular privilege. *See, e.g., Peck* v. *Tribune Co.*, 214 U.S. 185, 189 (1909). In *Sullivan* and *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967), this Court found the common law rule of strict liability incompatible with freedom of the press and erected a new standard of conduct focusing upon the fault of the publisher:

> "It is the conduct element, therefore, upon which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be . . . adjusted to strike a fair balance between the interest of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.
>
> . . . .
>
> . . . We consider and would hold that . . . [plaintiff] may also recover damages for a defamatory falsehood whose substance makes substantial damage to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the

> standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 153, 155 (Harlan, joined by Clark, Stewart and Fortas).

Mr. Justice Harlan's behavioral, misconduct approach in *Butts* led to the Court's square holding in *Gertz* abolishing strict liability from the law of defamation, *even for private figures;* and imposing a standard of care in all defamation cases that focuses upon the fault of the publisher. 418 U.S., at 340-41, 347.

By requiring the republisher to refrain from publishing unless he can guarantee the truth of the third party's remarks, the pre-*Sullivan* republisher rule requires the news media to engage in precisely the kind of self-censorship which caused this Court in *Gertz* to abolish strict liability and require proof of fault. In fact, this Court so reasoned in the one neutral reportage case it has heretofore decided, *Greenbelt Cooperative Pub. Ass'n.* v. *Bresler,* 398 U.S. 6,12-13 (1970) (citations and footnotes omitted):

> "It is not disputed that the articles published in the petitioners' newspaper were accurate and truthful reports of what had been said at the public hearings before the City Council. In this sense, therefore, it cannot even be claimed that the petitioners were guilty of any 'departures from the standards of investigation and reporting ordinarily adhered to by responsible publishers.' *Curtis Publishing Co.* v. *Butts, supra,* at 155 (opinion of Harlan J.), much less the knowing use of falsehood or a reckless disregard of whether the statements made were true or false."

Despite these holdings, the court in this case, and in *Dickey,* held neutral reportage to be inconsistent with this Court's status approach in *Gertz* and its subsequent emphasis upon the public figure, private figure dichotomy in *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976); *Wolston* v.

Reader's Digest Ass'n., Inc., 443 U.S. 157 (1979); and *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979).

However, viewed through the prism of the *Butts/Gertz* misconduct analysis, the public figure, private figure dichotomy is functionally irrelevant in neutral reportage cases; it relates solely to the burden of proof which the plaintiff must discharge when suing one who himself publishes as true a statement that is actually false and defamatory. In those cases, the burden of proving reckless disregard for the truth as to a public figure, or negligent disregard for the truth as to a private figure, is merely a means of gauging the misconduct of the publisher. In the context of neutral reportage, especially where (as here) the defendant has accurately and truthfully reported that a third party's statement is unfounded, these burdens of proof are functionally unrelated to determining whether the publisher is guilty of misconduct.

In this case, the falsity of the republished statement is the very fact that was truthfully reported by the media defendant; hence, it is assumed by hypothesis that the media republisher did in fact ascertain the falsity of the republished statement. It is therefore a *non sequitur* to inquire whether the media republisher was reckless or negligent in not ascertaining the falsity of the republished statement. It is the editorial decision to republish the ascertained falsehood which is alleged to be misconduct, 623 S.W.2d, at 885; and the burden of proof must therefore focus upon the decision to republish. As Mr. Justice Harlan phrased it, the question must be whether the republication constitutes "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 155.

All courts concede there are many circumstances in which it is entirely proper and constitutionally permissible to republish assertions known to be false. For example, all

courts recognize the privilege to report false statements uttered in public or governmental forums, and the privilege of the media to report a false allegation made by one candidate for public office against another, even if the media knows or believes the allegation to be false.[14] All would concede that, in those circumstances, it is no "departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," *id.*, for an editor to publish statements without regard to his subjective belief as to their truth.

Once we move from those obvious circumstances into other factual situations, the conflict among the courts as to neutral reportage is, in reality, limited to where to draw the line between the permissible and impremissible republication of known falsehoods. Those courts which reject neutral reportage require the media defendant to find a common law privilege; but that approach is a relic of the strict liability rules repudiated in *Gertz*. Those Courts which adopt neutral reportage are merely applying the behavioral approach of *Butts* and *Gertz*.

II. BY RECOGNIZING FALSE LIGHT PRIVACY AS A TORT, THE JUDGMENT BELOW DECIDES AN IMPORTANT FIRST AMENDMENT ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In the fifteen years since this Court's decision in *Time, Inc.* v. *Hill, supra*, the lower courts and the commentators have vigorously debated whether the tort of false light invasion of privacy can exist consistently with the First Amendment. Thus, the decision below to recognize the false light tort in Kentucky presents this Court with an important question under the First Amendment which has not been, but should be, settled by this Court.

---

[14] *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Greenbelt Cooperative Pub. Ass'n.* v. *Bresler, supra; Pulverman* v. *A.S. Abell Co.*, 228 F.2d 797 (4th Cir. 1956).

The fundamental question is whether "false light privacy cases" merely duplicate "private individual defamation cases"[15] and, if not, whether the purported differences between the two torts can withstand scrutiny under the First Amendment as construed in this Court's post-*Sullivan* decisions.[16] This question has two facets, both of which are presented by the judgment in this case.

The first issue is whether the First Amendment requires newsworthiness to be a defense in false light privacy cases. The fathers of the right of privacy understood that defamation protects reputation whereas privacy protects solitude. That is why Warren and Brandeis recognized that the distinction between defamation and invasion of privacy by unwarranted publicity is that the newsworthiness of the publication should be a complete defense in unwarranted publicity cases.[17] However, in this case, the Kentucky Supreme Court has squarely held that the newsworthiness of the publication is not a defense in false light privacy cases, 623 S.W.2d, at 889; and that is not an abberational decision. Quite the contrary, this judgment is in accord with the purported Restatement of the applicable law.[18]

The obvious fallacy of rejecting newsworthiness as a defense in false light privacy cases is that, without that

---

[15] *Compare, Cibenko* v. *Worth Pub. Inc.*, 510 F.Supp. 761 (D.N.J. 1981) *with Uhl* v. *CBS, Inc.*, 476 F.Supp. 1134 (W.D. Pa. 1979).

[16] Kalven, "Privacy in Tort Law — Were Warren and Brandeis Wrong?," 31 Law and Contemporary Problems 326 (1966); Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Cal. L.Rev. 935 (1968); Bloustein, "Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?," 46 Tex. L.Rev. 611 (1968).

[17] Warren and Brandeis, "The Right to Privacy," 4 Harv. L.Rev. 193, 214 (1890) ("The right of privacy does not prohibit any publication of matter which is of public or general interest.")

[18] Restatement (2nd) of Torts, §652E, Comment a. (1976).

defense, the tort no longer protects privacy at all; "[t]he interest protected is clearly that of reputation. . . "[19] But, historically, reputations have been protected by the law of defamation, subject to all the First Amendment protections fashioned by the common law and by this Court in *Sullivan* and its progeny. The very real concern is that "the action for invasion of the right of privacy may come to supplant the action for defamation."[20] Indeed, as this case unfortunately illustrates, the lower courts in recent years have blithely recognized false light privacy as a cumulative remedy for damage to reputation while simultaneously refusing to apply to false light cases the historic defenses mandated by the First Amendment to protect our cherished freedoms of speech and press.[21] As Dean Prosser said:

> "It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently is still unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of the freedom of the press and

---

[19] Prosser, "Privacy," 48 Cal.L.Rev. 383, 400 (1960).

[20] Wade, "Defamation and the Right of Privacy," 15 Vand. L. Rev. 1093, 1121 (1962).

[21] Because the "Restatement" actually preceded most States' adoption of the tort, most decisions which adopt false light privacy contain nothing more than an uncritical incantation of the Restatement (2nd) of Torts. *See, e.g., McCormack* v. *Oklahoma Pub. Co.*, 613 P.2d 637 (Okla. 1980).

> the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?" Prosser, *supra*, 48 Cal. L. Rev. 383, at 401.

This concern should now be allayed by this Court reviewing and reversing the judgment in this case.

The second issue is whether, consistent with the First Amendment, the alleged false light portrayal can be deemed tortious if it is not sufficiently damaging to reputation to also be defamatory. For example, in this particular case, the Kentucky Supreme Court said:

> "*To sustain this action, the person need not be defamed.* It is sufficient that the publicity attribute to him characteristics, conduct or beliefs that are false, and that he is placed before the public in a false position." 623 S.W.2d 888, n. 9 (Court's emphasis).

Again, this is not an abberrational holding, but is in accord with the purported Restatement of the law.[22] This trend in the cases has also elicited sharp academic criticism.

For example, Professors Nimmer and Kalven have argued that this is the very reason why false light privacy should not be recognized as a tort apart from defamation:

> "If a false statement will not constitute a cause of action for libel, why should a plaintiff be able to circumvent the limitations built into the law of defamation by labeling his action one for invasion of privacy?"[23]
>
> "If the statement is not offensive enough to the reasonable man to be defamatory, how does it become

---

[22] Restatement (2nd) of Torts, §652E Comment b (1976).

[23] Nimmer, *supra* note 16, at p. 963.

> offensive enough to the reasonable man to be an invasion of privacy? . . . . [I]f the desire is to relax somewhat the criteria of what is defamatory, would it not be more rational to do that openly and directly?"[24]

The judgment in this case dramatically illustrates the correctness of Professors Kalven and Nimmer's concern.

The Kentucky Supreme Court correctly defines "defamatory" as a writing that is false and:

> "tends to [i] bring a person into public hatred, contempt or ridicule; [ii] cause him to be shunned or avoided; or, [iii] injure him in his business or occupation." 623 S.W.2d, at 884.

Presumably, a publication which places the other in a false light before the public is something less than a publication that is "defamatory" and, therefore, a publication may now be tortious and actionable in Kentucky even if it falls short of bringing a person to ridicule, or to be shunned, or to lose business. Otherwise, the false light privacy tort would be a useless redundancy. But, if a publication that falls short of being defamatory is now tortious in Kentucky, how short may it fall and still be actionable? The Kentucky Court has attempted to answer this question by requiring that "the false light in which the other was placed would be highly offensive to a reasonable man. . . ." 623 S.W.2d, at 888. But how is that different from the holding that the publication is not "defamatory" unless it brings the person into ridicule? Since the Kentucky Supreme Court insists that the two torts are not identical, the only plausible inference is that a falsehood that is not sufficiently damaging to reputation to be defamatory has suddenly become tortious in Kentucky.

---

[24] Kalven, *supra* note 16, at p. 340. *Accord*, Note, "False Light — Invasion of Privacy?." 15 Tulsa L. Rev. 113, 120-24, (1979).

The law of torts not only allocates social costs, but also deters conduct which society deems deleterious. In the context of media torts, this deterrence operates by forcing publishers and broadcasters to act as self-censors. That, of course, is the intended effect of making certain media behavior tortious, but that also is what produces the inevitable tension between media torts and freedom of the press. One of the ways this tension has historically been ameliorated is by the requirement that the publication is not actionable unless it is defamatory:

> "There is common agreement that a communication that is merely unflattering, annoying, irking, or embarrassing, or that hurts the plaintiff's feelings, without more is not actionable .... The distinction between what is unflattering, insulting or derogatory and what will actually injure reputation is crucial.... [I]f each such statement gave rise to a cause of action, courts would have time for nothing but defamation suits." R. Sack, *Libel, Slander and Related Problems* (1980), pp. 4546 (citations omitted).

This principle was recognized by this Court in *Gertz* v. *Robert Welch, Inc., supra.* Alluding to the controversy swirling around whether false light privacy should even by recognized as a tort, this Court said:

> "We hold that, so long as they do not impose liability without fault, States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.... At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.' This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability upon a factual misstatement whose content did not warn a reasonably prudent editor or broad-

> caster of its defamatory potential. Cf. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution." 418 U.S. at 347-48. (footnotes omitted).

Such a case is now before this Court, and its proper resolution awaits the grant of certiorari in this case.

III. BY APPLYING THE SIMPLE NEGLIGENCE STANDARD TO A LIMITED PUBLIC FIGURE, THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF BY THIS COURT.

Since *Sullivan*, this Court has labored to strike a balance between the need for a free press and the need to protect personal reputations. *See, e.g., Hutchinson* v. *Proxmire, supra*, 443 U.S., at 134. In *Rosenbloom*, the lodestar was the newsworthiness of the subject matter of the publication. But, in *Gertz*, the lodestar became the status of the plaintiff, and the Court recognized the statuses of public official, pervasive public figure, limited public figure and private individual. 418 U.S. at 344-45.

Subsequently, in *Firestone, Hutchinson*, and *Wolston, supra*, the Court continued to recognize the status of limited public figure, but resolved each of those cases on their facts by determining the plaintiff was a private individual. However, as Justices Blackmun and Marshall noted, the Court seemed to be retreating from its recognition of the status of limited public figure. 443 U.S. at 169-70. While *Rosenbloom* may have conferred too little protection to reputation, these Justices believed *Wolston* seemed to confer too little protection to a free press.

An analysis of these recent decisions indicates an understandable reluctance by the Court to impose the

demanding Sullivan Standard[25] upon any one whose status as a public figure is anything less than pervasive. *Cf.*, 443 U.S. at 168. The real impediment to the development of the law of defamation, however, is that the Court has limited its choice of burdens of proof to two (the Sullivan Standard and simple negligence), while fashioning three statuses (pervasive public figure, limited public figure and private individual). What is obviously needed is an intermediate burden of proof correlated with the intermediate status of limited public figure.

In order to fashion the needed, intermediate burden of proof, the Court must first analyze why the so-called "limited public figure" poses a First Amendment concern. As *Rosenbloom* correctly recognizes, the burden of proof in a libel case is not fashioned out of a lack of concern for the individual's reputation. An individual who is not a pervasive public figure becomes the subject matter of a news story not because of his status or personality, but because of his involvement in a matter of legitimate interest to the public. Thus, in creating a standard of conduct to govern editors in reporting the individual's role in that event, and in creating a burden of proof by which to judge whether the standard of conduct has been met, it is illogical to focus upon the individual's status rather than focusing upon the conduct of the editor in reporting the individual's role in a newsworthy event. Accordingly, the simple negligence standard is not the appropriate standard of conduct in limited public figure cases. If the Court is unwilling to apply the Sullivan Standard, the more appropriate standard of conduct by which to judge the actions of the news

---

[25] As used herein, the "Sullivan Standard" means the "actual malice" test of *New York Times Co.* v. *Sullivan*, *supra*, which was recapitulated by the Court in *Gertz* as follows:

> "[A plaintiff] may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." 418 U.S. at 342.

media is either that set forth in *Butts* (see pages 18-19, *supra*); or in the leading case of *Chapadeau* v. *Utica Observer, Inc.*, 341 N.E.2d 569 (N.Y. 1975);[26] and the decision in this case by the Kentucky Supreme Court, applying the simple negligence standard to a limited public figure, should therefore be reviewed by this Court.

IV. THIS CASE PRESENTS THE ISSUE AS TO WHICH CERTIORARI WAS GRANTED THIS TERM IN WILSON V. SCRIPPS-HOWARD BROADCASTING CO.

In *Wilson* v. *Scripps-Howard Broadcasting Co.*, No. 81-412, cert. dismissed under Rule 53, 102 S.Ct. 500 (1981), this Court granted certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit holding that, under this Court's holding in *Gertz* v. *Robert Welch, Inc., supra*,[27] the plaintiff has the burden of proving the falsity of the publication he alleges to be defamatory. However, after certiorari was granted, *Wilson* was settled.

The issue presented in *Wilson* is again presented to the Court in this case. *See*, Statement of the Case, *supra*, pages 15-16. Thus, the considerations which prompted this Court to grant certiorari in *Wilson* are equally applicable here.

---

[26] The New York Court of Appeals held that the plaintiff "must establish by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." 341 N.E.2d at 571.

[27] "Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in New York Times Co. v. Sullivan, . . . 'Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." 418 U.S. at 340-41.

CONCLUSION

For these reasons, Petitioners respectfully pray that a writ of certiorari issue to review the judgment entered herein by the Supreme Court of Kentucky.

Respectfully submitted,

Edgar A. Zingman
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel of Record for Petitioner

Of Counsel:

Sheryl G. Snyder
Raymond M. Burse
Kimberly K. Greene
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Appendix

APPENDIX A

Rendered: October 13, 1981
To Be Published

SUPREME COURT OF KENTUCKY

80-SC-285-DG

JOHN TIM McCALL — MOVANT

V. ON REVIEW FROM COURT OF APPEALS
79-CA.1011-MR
(Jefferson Circuit Court No. 219331
Honorable Michael O. McDonald, Judge)

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, ET AL — RESPONDENTS

OPINION OF THE COURT
REVERSING

The general problem to be addressed on this appeal is the tort liability of print media to private citizens for the publication of defamatory statements and for the invasion of their right of privacy. The specific issue to be decided deals with such liability for the contents of an article appearing in the Louisville Times, a daily newspaper of substantial circulation distributed primarily in Jefferson County, Kentucky.

Movant, John Tim McCall, a Louisville attorney, was contacted by Kristie Frazier about the possibility of his representing her in two

narcotic-related criminal charges. About the same time, respondents Krantz and Van Howe, reporters for the Times, were investigating alleged harrassment of the drug community by narcotics agents and other local police. In the course of their investigation, the reporters interviewed Frazier who informed them that McCall had offered to represent her for a contingent fee and that part of the fee would be used to "fix" the cases or to bribe a judge. On March 17, 1976, the Times published a front page article, authored by Krantz and Van Howe, which described the results of the investigation, including the repetition of the allegations of bribery and a "fix."[1]

McCall filed suit against the two reporters and the Courier-Journal and Louisville Times Company, which owns and operates the Times. The basis of the suit was two-fold: (1) libel, for publishing the allegation of a "fix" or bribery, even though the charge admittedly could not be sustained, and (2) invasion of McCall's right of privacy. The trial judge granted summary judgment to the newspaper and the reporters. The Court of Appeals affirmed. Because of the importance of the issues raised, we granted discretionary review.

Movant argues that (1) the statement that he as an attorney was guilty of intent to bribe a judge or

---

[1] The article in its entirety is incorporated in Justice Lukowsky's separate opinion.

"fix" a case is defamatory; (2) the newspaper libeled him as a private citizen by simply printing such an allegation, even though the reporters did not specifically accuse him of bribing a judge or "fixing" a case; and (3) the newspaper invaded his privacy by arranging for Frazier to trespass on his property with a tape recorder concealed in her purse. Respondents argue that (1) the article when read as a whole is not libelous; (2) a newspaper cannot be held strictly liable for publishing defamatory statements about private individuals; and (3) newspapers are not guilty of libel when they simply report what occurred.

We will discuss the two possible bases of liability, libel and invasion of privacy, separately.

I. LIBEL

A. WAS THE ARTICLE LIBELOUS

Libel is the publication of a written, defamatory, and unprivileged statement. Writing and publication are conceded here. The writing is defamatory if it tends to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation.

It is an elementary principle of the law of libel that the defamatory matter complained of should be construed as a whole. Smith v. Pure Oil Co., 278 Ky. 430, 128 S. W.2d 931 (1939); Re-Statement (Second) of Torts, Sec. 563, comment d (1976). The

alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader and not be subjected to the critical analysis of the legal mind. Digest Publishing Company v. Perry Publishing Co., Ky., 284 S.W.2d 832 (1955). We must, therefore, analyze the article in its entirety and determine if its gist or sting is defamatory.

The gist of the article is that the reporters became interested in McCall's conduct while they were interviewing Frazier on another matter. She alleged, in the first interview, that McCall had offered to "fix" her case for $10,000. Frazier signed an affidavit to the effect that McCall for said fee would guarantee that she would "walk in the courtroom and turn around and walk back out." A witness corroborated that McCall had said this. The interview and the affidavits relating to an alleged "fix" were the sparks that ignited the investigation and the subsequent publication of the article.

At the instance of the two reporters, Frazier agreed to make an appointment with McCall, and to carry a concealed tape recorder. She was told only one specific question to ask: "Can't this case be handled in the regular way for $1,500, without a payoff, or does it have to take $10,000 to keep me out of jail?" The plan was that if the answer given by McCall to that question (and presumably any other incriminating statement he made) constituted

an attempt to bribe a judge,[2] the newspaper would provide the money. Following the meeting between McCall and Frazier, the Times analyzed the transcript of their conversation and "found no indication of any 'fix'."

In spite of this conclusion, the Times decided to publish a detailed description of the entire transaction. The story appeared on page one and included the allegations made by Frazier and her witness that McCall had offered to "fix" the case or bribe a judge. These allegations were published, *in spite of the fact that the newspaper knew -- and admitted it knew -- that there was no evidence of any such crime on the part of McCall.*

What we have is a situation where the newspaper says to the reader, "we don't find any evidence of a crime on the part of McCall, but we heard some contrary stories and we are going to repeat them anyway." Contrary to the statement of respondents' counsel that there were only one or two references to an alleged illegal act of McCall in the article, we have found references in nine paragraphs in the aricle which use the words "fix," "illegally," "improper offers," "possible mishandling," "fix or bribe," "payoff," and "illegal way." All these terms refer to the allegations of McCall's alleged misconduct.

---

[2] KRS 521.020 makes it a felony to bribe a judicial officer.

In addition, the article spends a great deal of time to show that a contingent fee, allegedly suggested by McCall in a criminal case, may be a serious violation of the canons of legal ethics. The article unquestionably paints a sordid picture of McCall as an attorney. The repeated use of the words "fix," "bribe," etc., with reference to McCall, are so overwhelming that a lay person would, we believe, inevitably conclude that McCall did solicit a high legal fee for the purpose of "fixing" a case or bribing a judge. We conclude that the article in question is defamatory as a matter of law.

B. IS THE NEWSPAPER LIABILE FOR PUBLICATION OF THE DEFAMATORY STATEMENTS?

In the present case, the newspaper did not specifically accuse McCall of offering to "fix" the case or to bribe a judge. It simply repeated numerous times the allegations made to this effect. The newspaper argues that it is not liable to McCall because there has been no showing of fault in its actions in printing these statements of another, and that it is not strictly liable for what appears on its pages, even if the stories are defamatory.

The Federal courts, led by the United States Supreme Court, have been developing a body of law in recent years which defines the protection the First

and Fourteenth Amendments give the press for libelous publications.

In New York Times Co. v. Sullivan, 376 US 254, 84 S.Ct. 710, 11 L.Ed2d 686 (1964), the Court ruled that damages could not be recovered for defamation of a *public official* without clear and convincing evidence of actual malice on the part of the publisher. Actual malice requires a showing of knowledge of falsity of the defamatory statement or reckless disregard of its truth of falsity. *Id.*, In Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967), the court applied the Sullivan standard of defamation to *"public figures."* In Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296 (1971), the court, in a plurality opinion, applied Sullivan to a publication concerning *private individuals* where the matter was of concern to the public.

If the Supreme Court had left Rosenbloom untouched, respondent here clearly would have had the right to publish the defamatory statements made by Frazier about McCall (who concededly is a private individual) with relative impunity because they dealt with a matter of public interest, *viz.*, possible bribery of a judge or "fixing a case," The Court modified the Rosenbloom case and retreated from it in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). This case

sounded the death knell of the doctrine of liability without fault in libel cases by private individuals against media defendants. The Court ruled that each state may allow private individuals to recover compensatory damages, even if the defendant publisher or broadcaster disseminated the defamatory statement without actual malice.

> "So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

Id at 347, 94 S.Ct. at 3010, 41 L.Ed.2d at 809. See Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), where the court characterized Gertz as a repudiation of Rosenbloom with respect to defamation of private individuals.

While it is not our function to approve or disapprove the ruling or reasoning of the Supreme Court, we concur in the rationale that the court used in balancing the interests of the press with those of private individuals. Private individuals and their reputations were declared to be more deserving of protection from defamation than those of public figures or public officials. Private individuals do not have the easy access to the self-help remedy of response to defamatory falsehoods via the news media that public persons have. Moreover, they neither voluntarily nor involuntarily expose

themselves to public scrutiny by seeking or holding public office or assuming a prominent or influential role in society. In the parlance of the horse industry, part of the turf of being a public official or public person is to be subject to public scrutiny. This is not necessarily so in the case of private citizens.

Following the decision in Gertz, many states adopted standards of liability.[3] This court has not.[4] We have given considerable thought to an appropriate standard, recognizing the far-reaching effects of this ruling on the rights and duties of the press in this state. We are also aware of the fundamental right of private individuals to be free from being defamed.

The Kentucky Constitution guarantees freedom of the press, but holds newspapers accountable for abusing that liberty. Section 8 of the Constitution reads:

> "Freedom of speech and of the press -- Printing presses shall be free to every person who

---

[3] There is a plethora of writing in this area. See, e.g., Spencer, Establishment of Fault in Post-Gertz Libel Cases, 21 St. Louis University Law Journal, 374 (1977); Sack, Libel, Slander and Related Problems, R. Sack (1980); Hecht, The Defamation Action for Private Individuals: The New Fault Standard, 22 South Dakota Law Review 163 (1977).

[4] The Court of Appeals in the case of E.W. Scripps Co. v. Cholmondelay, Ky. App., 569 S.W.2d 700 (1978) approved a circuit court instruction which set up a simple negligence standard.

> undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. *Every person may freely speak, write and print on any subject, being responsible for the abuse of that liberty.*" (emphasis added).

We believe that while it is our option under Gertz to adopt a standard of fault, Kentucky Const., Sec.8, mandates that we adopt a standard which adequately protects the private individual from defamation. We choose simple negligence.

The standard used by Tennessee is a reasonable one. In Memphis Publishing Co. v. Nichols, Tenn., 569 S.W.2d 412, 418 (1978), the Tennessee Supreme Court said:

> "The appropriate question to be determined from a preponderance of the evidence is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it."

Another way of stating the standard is that a private plaintiff may recover on a showing of simple negligence, measured by what a reasonably prudent person would or would not have done under the same or similar circumstances.

The adoption of this standard does not imply any change in the basic common law and statutory

rules of libel and slander as expressed and interpreted by this court in the past. See Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981).

One further point remains on the question of liability. We are urged by the respondents to adopt the doctrine of neutral reportage. In Edwards v. National Audubon Society, Inc., 556 F. 2d 113 (2d Cir. 1977), cert. denied, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977), the Court of Appeals granted the press absolute immunity from liability for accurately reporting "newsworthy statements," regardless of the press' belief about the truth of the statements. This doctrine has not been approved by the Supreme Court of the United States and has not received approval in other jurisdictions.[5]

We reject the doctrine. Accordingly, respondents' argument that they simply repeated allegations is without merit.

Having determined that the article which is the subject of this lawsuit is defamatory, having adopted a standard of fault pursuant to Gertz and Ky. Const. Sec. 8, and having rejected the doctrine

---

[5] See, e.g., Dickey v. CBS, Inc., 583 F.2d 1221 (3rd Cir. 1978). The doctrine has also been criticized in many academic treatises. See, e.g., The Privilege of Neutral Reportage, 1978 Utah Law Review 347.

of neutral reportage, we conclude that the Court of Appeals erred when it affirmed the trial court's grant of summary judgment.[6]

II
INVASION OF McCALL'S RIGHT OF PRIVACY

As part of his complaint, McCall alleged that the reporters invaded his privacy by concealing a tape recorder in Frazier's purse prior to her entering his office. In his amended complaint, McCall also attacked the newspaper article as being an invasion of privacy, in that it "implies that the Plaintiff is an unethical and dishonest attorney practicing in Jefferson County and places [him] *in a false light before the members of the general public.*" (Emphasis added.)

The trial court rejected both claims when it granted summary judgment. The court declared that the use of the recording device was not an invasion of the plaintiff's right of privacy and that McCall was not "placed in a false light" because the article was not false and did not constitute reckless behavior.

In affirming the trial court, the Court of Appeals did not consider the "false light" ruling,

---

[6] With respect to damages, Gertz limits recovery to any and all actually proved damages. With respect to punitive damages, see KRS 411.051(1).

but addressed only the problem of the use of the concealed tape recorder. Because we decide the issue on the basis of "false light," we do not deem it necessary to discuss the other aspect of the right of privacy claim.

The invasion of privacy as an actionable tort has been part of Kentucky law since 1909.[7] Subsequently, the development of this theory of law has grown at a modest pace.[8] The basis of the tort, while not subject to precise definition, may be best described as the right of every citizen to be "let" alone. Private individuals have the right to live their lives without unwarranted interference by the public about matters with which the public is not necessarily concerned. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927). There are exceptions to this rather sweeping principle of law. The right of privacy does not prohibit: (1) any publication of a matter which is of public or general interest; (2) the publication of a matter which is privileged communication according to libel and slander law; (3) statement which are oral; and (4) a publication which is true. *Id.* Kentucky has not specifically adopted the "false light" aspect of the tort.

---

[7] Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909).

[8] For an excellent discussion of invasion of privacy, see Bunch, Kentucky's Invasion of Privacy Tort - A Reappraisal, 56 Kentucky Law Journal 261 (1967-68).

We believe that the principles enumerated in Foster Milburn Co. v. Chinn, supra at note 7, and Brents v. Morgan, supra, which set forth the bases and nature of the tort of invasion of privacy, would best be furthered by our adoption of the principles of that tort as enunciated in the Restatement (Second) of Torts (1976). The pertinent section reads:

"Sec. 652A. General Principle

(1) one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another. . .; or

(b) appropriation of the other's name or likeness. . .; or

(c) unreasonable publicity given to the other's private life. . ., or

(d) publicity that unreasonably places the other in a false light before the public. . ."

As we view this aspect of the appeal, the issue is whether the trial court erred in ruling that the Louisville Times article did not place McCall before the public in a false light.

The two basic requirements to sustain such an action are: (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed. Restatement (Second) of Torts, Sec. 652E (1976)[9]

McCall's amended complaint alleged that the article implied to the public that he was an "unethical and dishonest attorney" and that such publicity placed him in a "false light" before the public. Our view as to the impact of the article has been expressed in the section of the opinion dealing with libel. The article clearly indicates that there was a probability that McCall was guilty of unethical conduct, and would be read by a lay person as having stated that he intended to "fix" a case or bribe a judge. We believe that the issue of false light should have been submitted to a jury.

---

[9] Much has been written as to the similarity of "false light" and defamation. The purpose of a false light action is to protect the individual in not being made to appear before the public in an unreasonably objectionable false light and otherwise than as he is. *To sustain this action, the person need not be defamed.* It is sufficient that the publicity attribute to him characteristics, conduct or beliefs that are false, and that he is placed before the public in a false position. See comment b to Restatement (Second) of Torts, Sec. 652E (1976). See also False Light—Invasion of Privacy? 15 Tulsa Law Review 113 (1979).

With respect to the constitutional restrictions on the tort of invasion of privacy, there is a substantial gray area. In Time v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), the Supreme Court examined, for the first time, the effects of the First and Fourteenth Amendments on this tort. The Court held that a state law protecting privacy (whether statutory or judicial) no longer could permit recovery for injury to privacy upon proof of falsity alone, at least when the material published was of public interest and the injured party was a private individual. Recovery in such a situation was limited to those false publications which were made upon a showing of knowledge of the falsity of the statements or a reckless disregard as to the truth. The Court applied the malice standards of New York Times v. Sullivan to all privacy cases where matters of public interest were involved. The Court placed its emphasis on the nature of the subject matter, rather than on the status of the injured person.[10]

After Hill, the Supreme Court rendered Gertz. It will be remembered that in Gertz the Supreme Court ruled that in defamation cases a private individual could recover damages for published untrue defamatory statements so long as there was

---

[10] It seems logical that those same standards do not apply to a private person where the subject matter is not one of public interest.

no strict liability imposed. Whether Gertz will be used to modify Time v. Hill is only speculation. Until the Supreme Court has spoken, we must comply with the ruling in Hill, and recovery is predicated on the standards set out therein. In the event the Gertz rule is applied, we believe the desirable standard of fault is that of simple negligence which we have adopted in this opinion for libel cases.

We have ruled in the past that if a publication deals with a matter of public interest or public concern, even if it invades a person's privacy, it is not subject to the tort of invasion of privacy. Sellers v. Henry, Ky., 329 S. W.2d 214 (1959); Brents v. Morgan, *supra.* Respondents argue, while not specifically mentioning "false light," that the defense of public interest should be applicable to all invasion of privacy cases. We do not agree. It should, and is, available as a defense in all those cases where the published statements are true. However, it is not available in cases of the publication of false statements, especially where a *private individual's* right of privacy is involved.

The damages which are recoverable for invasion of privacy are set forth in Restatement (Second) of Torts, Sec. 652H (1976). They are as follows:

> "One who has established a cause of action for invasion of his privacy is entitled to recover damages for

(a) the harm to his interest in privacy resulting from the invasion;

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion;

(c) special damages of which the invasion is a legal cause."

An action for defamation and an action for invasion of privacy (false light) are closely allied. An injured party may seek relief through both causes of action, arising out of the same publication, but he is limited to only one recovery.

By way of summary, we believe that the Court of Appeals erred when it affirmed the trial court's grant of summary judgment against McCall on his claim of invasion of privacy.

The decision of the Court of Appeals and the judgment of the trial court are reversed, and the cause is remanded to the Jefferson Circuit Court with instructions to take action in conformity with this opinion.

All concur. Lukowsky, J., files a separate opinion.

ATTORNEYS FOR MOVANT:

Edward M. Post
Taustine, Post, Berman, Fineman & Kohn
812 Marion E. Taylor Building
Louisville, Kentucky 40202

ATTORNEYS FOR RESPONDENTS

Edgar A. Zingman
Sheryl G. Snyder
Raymond M. Burse
Wayatt [sic], Tarrant & Combs
2800 Citizens Plaza
Louisville, Kentucky 40202

****

Rendered: October 13, 1981
To be published

SUPREME COURT OF KENTUCKY

No. 80-SC-285-DG

JOHN TIM McCALL MOVANT

ON REVIEW FROM COURT OF APPEALS
70-CA-1011-MR

V. (Jefferson Circuit Court No. 219331
Hon. Michael O. McDonald, Judge)

COURIER-JOURNAL AND LOUISVILLE
TIMES COMPANY, ET.AL. RESPONDENTS

SEPARATE OPINION OF JUSTICE LUKOWSKY

I regret that I am unable to join in the majority opinion. Unfortunately, the majority paints with far too broad a brush. Among other things, they conjure up the question of a violation of the right of privacy through placing a person in a false light when that issue was never presented nor argued to either the Court of Appeals or this court. Their fervor to decide an abstract question of law without the framework of a concrete case and the advantage of briefing and argument escapes me.

In my view, all that is necessary to dispose of this case may be said as follows:

We granted discretionary review of this case so that we might define the impact of the decision of the Supreme Court of the United States in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) on the libel law of Kentucky.

The respondents wrote and published the following article in their newspaper which has a wide circulation in Kentucky:

The Louisville Times, Wednesday, March 17, 1976
Lawyer's 'guarantee' to keep woman free for $10,000 ethical?

By RICHARD KRANTZ and
TOM VAN HOWE

Louisville attorney Tim McCall, in possible violation of his profession's ethics, told a defendant in a criminal case here that for $10,000 he would either keep her out of jail or refund most of her money.

"(If) you don't go to jail or the penitentiary, then I'll charge you 10 grand. If you do, then. . .I'll charge you $1,000 for my trouble." McCall said last week to Kristie Frazier, 27, who is charged with trafficking in narcotics.

". . . In other words" McCall said. "I'm guaranteeing you for nine grand more that you won't–that nothing will happen to you."

McCall, 34, a cochairman of the Louisville Bar Association's Criminal Practices Committee, denied making any unethical guarantee to Miss Frazier, or doing anything else unethical involving her case.

According to a tape recording of the conversation between McCall and Miss Frazier, McCall also told the woman that if she raised $10,000 he would tell a prosecutor and a judge "that I'm making a substantial fee, an maybe the prosecutor will be sympathetic to me, and he will, too . . . they'll help me, and that'll help you"

When Miss Frazier expressed concern about her court appearance Monday and the possibility of her going to jail this week, McCall told her, "Hey, don't worry about it–I'm going fishing with (Criminal Court Judge John P.) Hayes Friday. All weekend."

Any such statements made by a lawyer to a prospective client may violate two rules of the Code of Professional Responsibility of the American Bar Association (ABA), according to ABA spokesmen.

One rule prohibits lawyers, under penalty of bar association discipline, from agreeing upon a "contingency" fee" in a criminal case.

A contingency fee is, in effect, when an attorney sets a certain fee if the case is won, and a lesser fee if the case is lost.

The other prohibits lawyers from implying that they are able to "influence improperly" any tribunal or public official.

The conversation between McCall and Miss Frazier occurred last Wednesday in McCall's office. At the request of the Louisville Times, Miss Frazier recorded the conversation on a tape recorder in her purse.

During the conversation, Miss Frazier stated at least twice that McCall would be using the $10,000 she would raise to "fix" the case. After each such statement McCall stated that no "fix" or other illegal

action, such as payoff, would be involved. Once McCall said, "It's not a fix. Don't talk like that."

At another point, he said, "The $10,000 would be my legal fee and I'll figure out some way to get you out of this if I have to import the damnedest lawyer in town to do something."

In a telephone interview Monday, McCall said: "I don't think that any statement I made to Miss Frazier violates any code of ethics for attorneys or judges. I don't believe that I was unethical with her or agreed to do anything illegal."

McCall said he made no absolute guarantees of the results of the case to Miss Frazier.

"A guarantee," he said, "is when you tell somebody it is going to be that way – and no other alternative. I never told her that."

'Not a contingent fee'

McCall also said that while a "purely contingent fee" is unethical in a criminal case, his proposed arrangement with Miss Frazier was "not a contingent fee."

He said a contingent fee can be based on the outcome of a case or on the amount of work involved. He refused to discuss, however, whether his statements fell into either category.

McCall said the only reason he even agreed to talk to Miss Frazier about her case was because "two good clients of mine called me and asked me to help this girl out."

McCall added that his statement to Miss Frazier –that she shouldn't worry, because he was going fishing with Judge Hayes–meant "only that I was going fishing with Judge Hayes–and I didn't"

McCall said he never mentioned Miss Frazier's name on the fishing trip and added that he would not discuss a case out of court with a judge unless a prosecutor was present.

Judge Hayes, asked yesterday about the weekend fishing trip with McCall, said there was no conversation between himself and the attorney about Miss Frazier's case.

McCall said other attorneys, including a prosecutor, had been invited to accompany McCall and Hayes on the trip. But, McCall said, only a policeman accompanied them.

3 authorities consulted

The Times consulted two national authorities and one local authority on ethics in the legal profession.

Two of them said they would comment only if their names were not used. Both of these persons were associated with legal ethics committees on a national or local level.

All three agreed that there seemed to be a contingency fee involved in the case described to them by The Times. They said this was clearly unethical.

One man queried was Philadelphia attorney Lewis Van Dusen, the national chairman of the ABA's Ethics Committee.

"That's easy," Van Dusen said. "Contingent fees are not permissible in a criminal case." They are, however, permissible and common practice in civil cases, he said.

Two of the attorneys were asked whether it was proper for a lawyer to say not to worry because he is going fishing with the judge, and to say that he would try to seek sympathy by telling of his high fee.

One of them said that this seemed to be suggesting to a client that the lawyer could use "improper influence." He said he would have to know the full facts to be certain. The other said he could not comment without knowing the full facts.

All three experts said that they would have to know the precise facts of the case in order to comment further.

Specializes in criminal law

McCall, of 3400 Winchester Drive, specializes in the practice of criminal law. Early in his career, he served as both an assistant city attorney and as an assistant commonwealth's attorney. He is a 1966 graduate of the University of Louisville School of Law.

McCall on Monday asked Commonwealth's Atty. David Armstrong to bring the entire matter–including the actions of The Times in obtaining the tape–before a grand jury.

Armstrong plans action

Armstrong said yesterday that he intends to bring it before the grand jury and that he wants to determine if in fact, any unethical practices on the part of an attorney took place.

He also said he wants to determine if the press acted unethically or illegally by promoting or encouraging a bribe. He said if the newspaper or its representatives are guilty, he intends to prosecute.

He said he will prepare subpoenas to require the testimony before the grand jury of Times reporters who wrote the article. He said he will also seek to obtain the tape recording of the conversation between McCall and Miss Frazier.

The Times requested that Miss Frazier tape-record the conversation because the newspaper was attempting to investigate her allegations that McCall had offered to "fix" her case for $10,000. However, The Times found no indication of any "fix."

The Times first became interested in the case while interviewing Miss Frazier on another matter on March 3. She told reporters she could avoid going to jail if she could raise $10,000 to give to McCall.

She said that she went to McCall last January after some friends told her that he might be able to keep her out of jail.

At the January meeting in McCall's office, according to a sworn affidavit Miss Frazier gave to The Times, McCall told her that he would represent her, with no guarantees, for $1,500.

But for $10,000, Miss Frazier said in her affidavit, he would guarantee that she would "walk in the courtroom and turn around and walk back out."

Backed by witness

A witness to that meeting, who asked not be named, has also provided The Times with an affidavit supporting Miss Frazier's statements. However, McCall disputes Miss Frazier's account of that meeting.

Both Miss Frazier and the witness said they believed, based on the January conversation, that McCall intended to "fix" the case for $10,000.

After hearing their statements and receiving their signed affidavits, The Times decided to pursue the investigation.

The investigation was designed to determine if Miss Frazier's case was being handled illegally, and to

see if the attorney had, in fact, made improper offers to a prospective client.

The Times asked Miss Frazier if she would agree to go back to McCall's office, with a tape recorder provided by The Times in her purse, to see if McCall would repeat what he had allegedly told her in January.

The Times told Miss Frazier that if the attorney indicated to her that he was actually going to "fix" the case, the newspaper would consider providing the $10,000 in an effort to detect any possible mishandling of the case.

The Times told Miss Frazier that the decision to provide the money would be based on what McCall said on the tape, and if there was a definite indication that a fix or bribe might be involved.

She was not instructed by The Times to mention a "fix" or a bribe, but just to say what she ordinarily might say in such a conversation.

She was told only one question to ask. That question was, "Can't this case be handled in the regular way for $1,500, without a payoff, or does it have to take $10,000 to keep me out of jail?"

Times reporters felt that such a question might elicit an answer from McCall which would indicate whether the case was to be handled in a normal, legal fashion, or possibly in an illegal way.

The Times also told Miss Frazier that if bribery of a court official was indicated, this would be illegal for her or The Times to participate in.

Following the second meeting between Miss Frazier and McCall, last Wednesay, the tape recording of their conversation was evaluated by Times editors, reporters and the newspaper's attorneys.

The tape did not indicate payoffs that McCall contemplated to officials to dispose of the case, and the newspaper decided not to provide the money.

Indicted last April

Miss Frazier was indicted by a Jefferson County grand jury on April 30, 1975, on a charge of selling a quantity of cocaine to an undercover narcotics agent of the Jefferson County Police Department.

She has steadily maintained she is innocent of the charge, which is pending before Criminal Count Judge George Kunzman.

After her indictment, Miss Frazier hired attorney Richard Nash Sr. to represent her.

Nash said he advised Miss Frazier to plead guilty to the charge and accept the commonwealth's offer of one year's confinement in the Kentucky Correctional Institute for Women at Pewee Valley.

Nash told The Times he feared that if the case went to trial a jury would convict her. Miss Frazier could then be sentenced to five to 10 years in a state prison.

Miss Frazier was convicted almost five years ago of possession of marijuana, and Judge Hayes sentenced her to six months in jail. The sentence was probated for five years, however, and she did not spend any time in jail.

Following her latest arrest on the charge of trafficking in narcotics, Judge Hayes filed his own motion to revoke her probation.

Nash said he felt her changes for freedom were so poor that he told her, before she appeared in court Monday, to "come prepared to go to jail."

Nash said he thought her best bet would be to accept a year at the Pewee Valley facility by pleading guilty to the present charge, rather than face six months of more disagreeable confinement in the county jail by having her probation revoked by Hayes on the 1971 conviction.

Miss Frazier, knowing the high likelihood of her going to jail, turned to McCall last January, seeking a way to keep her freedom.

McCall disagrees with Miss Frazier's account of their first discussion. McCall told The Times that he flatly refused to represent her at that time and "sent her back to her attorney (Nash)."

However, the tape recording made at last week's meeting indicates that McCall did not flatly refuse earlier to represent her. There are two references on the tape to their first meeting.

The first refers to the fee McCall quoted her.

"Yeah, now look," Miss Frazier said. "Okay, for 15--you told me you would represent me for $1,500. . ."

"Fifteen hundred dollars," McCall said interrupting, "no guarantees, no nothing."

"No guarantees," Miss Frazier responded, "no nothing. Right."

The second reference to their original conversation came when McCall asked Miss Frazier who arrested her.

After naming the officer, she added, "You said you were going to talk to him."

"I didn't talk to him," McCall responded, "because you, I, never came back to talk to you about it."

During their taped conversation last Wednesday, McCall said he would represent Miss Frazier under "three conditions."

"They are," McCall said, "Number one that (attorney) Nash has no objections to it. . .

"Number two," he continued, "that it's between you and myself, and nobody else, discusses the fee. . ."

"Number three," McCall said, "is you have to take my word or you can trust (one of his clients) or somebody that knows me that if I get you out of it. By getting you out of it I mean you don't go to the penitentiary. It may be a probated sentence, it may be you have to leave the jurisdiction. If you don't go to jail or the penitentiary, then I'll charge you 10 grand. If you do, then I won't charge you--I'll charge you $1,000 for my trouble. But, in other words, I'm guaranteeing you for nine grand more that you won't, that nothing will happen to you."

"So, if I blow," McCall added, "I have to give you your money back. . . . I'll say that you're going to be out of it. Something could possibly go wrong, and if it did, I'd give you your money back. It's that simple."

Later, McCall impressed upon Miss Frazier that she should not tell Nash about their arrangement.

". . . I just don't want anybody to know about it. Now I'm serious about that. I don't want Nash. I don't want any policemen, any judges--I don't want nobody to know about it but me. It's between you and me."

After McCall told Miss Frazier that he was simply doing her a favor, that he didn't need the extra business, she mentioned that she was to appear in court the following Monday (this week).

"I'm a nervous wreck," she said. "They're going to put me in jail, and it's Monday. See? It's Monday, Monday."

"Monday's the 15th?" McCall asked. "Do you mean it's scheduled for trial Monday?"

"That's what I mean," Miss Frazier said. "You got to do something. If I could get you the money Friday. . ."

"Hey," McCall interrupted, "don't worry about it--I'm going fishing with Hayes Friday. All weekend."

Moments later, McCall instructed Miss Frazier not to say anything about his fishing trip with Hayes.

". . . Going around telling people he and I are friends (could) put him on the spot," McCall said. "He's a very honest judge. I'm going to tell you, believe it or not, the only way I could straighten this out is through legal recourse and the fact that I can tell him that I'm making a substantial fee, and maybe the prosecutor will be sympathetic to me, and he will, too . . . they'll help me, and that'll help you."

"Okay," Miss Frazier, said, "consider it done."

"I'll consider it done," McCall said, "when you come in here."

"With the $10,000," Miss Frazier said.

"Yeah," McCall replied.

Miss Frazier did not produce the $10,000, however, and Nash remained her attorney. Monday, when she appeared in court, she was offered the agreed upon deal from the commonwealth--one year in prison in return for a plea of guilty.

Miss Frazier reluctantly signed the necessary court papers. She said aloud that it was "ridiculous" to plead guilty to a crime she did not commit.

Judge Kunzman, noting that Miss Frazier had been talking in court to a reporter, then said he would refuse to accept the guilty plea.

Kunzman said he would not accept a plea of guilty from a defendant who was protesting her innocence at the same time.

As a result, both the matters in Hayes court and in Kunzman's court were continued to June 14. Kunzman said she would stand trial at that time.

The movant was less than gratified to find himself the subject of this article. His response was to sue the respondents for libel. The trial court granted a summary judgment which dismissed movant's complaint. The Court of Appeals affirmed. We reverse and remand.

For the dissection of this case, libel may be defined as the publication of a written, defamatory, unprivileged statement. Writing and publication are conceded here. The copy is defamatory if it tends to (i) bring a person into public hatred, contempt or ridicule; (ii) cause him to be shunned or avoided; or (iii) injure him in his business or occupation.

If a fact-finder believes movant's version of the incidents upon which the copy is based, false statements were disseminated. The thrust of the article is a trident. The movant (i) engaged in unethical fee charging practices (ii) offered to "fix" a case, and (iii) offered to bribe a judge. A priest

privileged to serve in the temple of justice is charged with its desecration. The copy is defamatory as a matter of law.

It is an ancient rule that authors and publishers may not repeat false and defamatory matter and escape liability with the plea that they were but quoting a source deemed authentic. Evans v. Smith, 21 Ky. 363, 5 T.B.Mon. 363 (1827); Gearhart v. WSAZ, Inc., D.C. Ky., 150 F. Supp. 98 (1957). They are not saved by accompanying the defamation with an expression of disbelief. The respondents submit that we should recognize an absolute constitutional privilege of "neutral reportage." The doctrine provides that the media are privileged to make reports of newsworthy charges even if they doubt their truth so long as they reasonably and in good faith believe that the charges are accurately conveyed. Edwards v. National Audubon Society, C.A. 2, 556 F. 2d 113, 120 (1977), cert. denied, 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977). There are at least two flaws in this diamond: (i) the courts that have recognized the doctrine have limited its application to statements about public figures and public officers, Edwards, supra; Dixson v. Newsweek, Inc., C.A. 10, 562 F.2d 626, 631 (1977), and movant, as we will hereinafter demonstrate, is a private person, and (ii) the constitution does not require the recognition of such a privilege, Dickey v. CBS, Inc., C.A. 3, 583 F.2d 1221, 1225 (1978).

The penultimate conclusion is that this case should have been submitted to a jury. The ultimate question is by what standard should the jury decide the case.

Gertz, supra, and its phylogeny sound the death knell of the doctrine of liability without fault in libel cases against media defendants. If the plaintiff is a public official or a public figure, he may recover only on clear and convincing proof of actual malice on the part of the defendant. Actual malice is established by showing that publication was made either with knowledge of the falsity of the defamation or with reckless disregard for the truth. If the plaintiff is a private person, the states are left free to adopt any rule of liability short of liability without fault.

The next determination that must be made is whether the movant is a public figure or a private person. We are satisfied that the movant is a private person because: (i) he is not a public official, (ii) the article was unrelated to prior coverage of the movant and was prompted by an independent investigation by the newspaper, (iii) he did not voluntarily thrust himself into the forefront of any particular public controversy in order to influence the resolution of the issues involved, and (iv) he had no regular and continuing access to the media for remedial self-help to rebut false defamatory factual allegations. Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); Wolston v

Readers Digest Assoc., Inc., 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976); Gertz, supra.

Section 8 of the Kentucky Constitution provides in part:

> "Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

Each of our four constitutions have qualified freedom of speech and press by responsibility for abuse of these liberties. Clearly, these provisions were not intended to grant greater protection than the First Amendment to the federal constitution which antedated our first constitution adopted in 1792 by only four months. Other states with similar constitutional provisions have found that the simple negligence standard is most compatible with their history and stated public policy. Martin v. Griffin Television, Inc., Okla., 549 P.2d 85, 92 (1976); Gobin v. Globe Publishing Co., 216 Kan. 223, 232, 531 P.2d 76, 83 (1975); Troman v. Wood, 62 Ill. 2d 184, 194-95, 340 N.E.2d 92, 297 (1975). We are persuaded to join their company.

The negligence test may be broadly restated as permitting recovery on a showing that in publishing a defamatory falsehood the defendant knew, or in the exercise of reasonable care should have known,

that the statement was false or would create a false impression in some material respect. Taskett v. King Broadcasting Co., 86 Wash.2d 439, 445, 546 P.2d 81, 85 (1976); Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 43 O. App.2d 105, 110, 334 N.E.2d 494, 498 (1974), cert. denied, 423 U.S. 883, 96 S.Ct. 151, 46 L.Ed.2d 111 (1975). The conduct of the defendant is to be measured against what a reasonably prudent person would, or would not, have done under the same or similar circumstances. This is the ordinary negligence test that we adopt, not a "journalistic malpractice" test which bases liability upon a departure from supposed standards of care set by the publishers themselves. Memphis Publishing Co. v. Nichols, Tenn., 569 S.W.2d 412 (1978); Taskett, supra; Troman, supra.

We are convinced that Gertz and its phylogeny impose the burden of proof and risk of non-persuasion on the issue of falsity of the defamatory statement on the plaintiff. Wilson v. Scripps-Howard Broadcasting Co., C.A. 6, 642 F.2d 371 (1981). Gertz and its progeny preclude the award of either punitive or "presumed" damages unless the "actual malice" standard is met. If this standard is not met, recovery is limited to "actual injury," loosely defined as impairment of reputation, loss of standing in the community, personal humiliation, mental suffering and economic loss. Time, Inc. v. Firestone, supra.

We are not favorably impressed by the other assignments of error made by the movant.

The decision of the Court of Appeals and the judgment of the Jefferson Circuit Court are reversed, and the cause is remanded to the trial court for further proceedings consistent herewith.

* * * * * * * *

APPENDIX B

OPINION RENDERED: March 28, 1980
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals
79-CA-1011-MR

JOHN TIM McCALL — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MICHAEL O. McDONALD,
JUDGE, ACTION NO. 219331

COURIER-JOURNAL AND LOUISVILLE
TIMES COMPANY, RICHARD KRANTZ
and TOM VAN HOWE — APPELLEES

AFFIRMING

* * * * * * * *

BEFORE: COOPER, HOWERTON, and REYNOLDS, Judges.

HOWERTON, JUDGE. McCall appeals from a summary judgment of the Jefferson Circuit Court dismissing his complaint for damages due to two allegedly libelous newspaper articles appearing in *The Louisville Times*, written by reporters, Krantz and Van Howe. McCall presents two allegations of error; (1) that genuine issues of material fact are yet

to be resolved, and (2) that the trial court misconstrued and misapplied the law. Four theories of liability were presented to the trial court, but McCall now relies on only two of these theories, invasion of privacy--intrusion/trespass, and libel.

McCall is an attorney. He counseled with Kristie Frazier concerning two criminal charges. Frazier began spreading insinuations that she could buy her way out of her trouble. The appellees, Krantz and Van Howe, reporters for *The Louisville Times*, met with Frazier. In Frazier's words, McCall told her that "for $10,000.00 he would guarantee me that I'd walk in, but I would turn around and walk back out with him."

Krantz and Van Howe decided to investigate the possibility of bribery in the judiciary and met with Frazier again. They furnished her with a tape recorder and asked her to return to McCall's office. They also instructed her as to what questions to ask. They agreed to provide the $10,000.00 for her, if the dismissal of the criminal charges could be fixed.

On March 10, 1976, Frazier returned to McCall's office with the recorder. She asked the prearranged questions. The attorney told her there would be no "fix" and then inquired as to whether she had a recording device on her person. After Frazier's denial, McCall then stated that if he was

able to keep Frazier out of jail, his fee would be $10,000.00, but if not, $9,000.00 would be returned to her. Although McCall's conduct was questionable in relation to the professional code, there was no evidence of bribery in the judicial system. Nevertheless, on March 17, 1976, *The Louisville Times* published and circulated a news article based on these events. On August 19, 1976, the newspaper carried an account of the lawsuit which resulted.

McCall argues that there are disputes regarding several material facts. As to his first meeting with Frazier, he denies her allegations and further contends that the recording of the second meeting confirms this denial. He argues that the articles were unfair since they failed to mention points in the taped conversation favorable to his character and demeanor. It is also argued that the reporters were not justified in suspecting bribery after hearing Frazier's version of the first meeting and that they most certainly should have had doubts as to her credibility. McCall states that Frazier did not return to his office to legitimately discuss employment or her case. In addition, he outlines his own version of what occurred at the taped meeting since he disputes the accuracy of the transcription. Even if we consider all of these facts in a manner most favorable to McCall, this Court must affirm the summary judgment as a matter of law.

The first tort theory argued is labeled by McCall as invasion of privacy--intrusion/trespass. The appellees claim the nonexistence of this tort, stating that McCall created a hybrid cause of action. Prosser labels the tort "intrusion," which consists of "intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters. . . ." W. Prosser, *Torts* § 117, at 807 (4th ed. 1971). Prosser extends the tort to include evesdropping upon private conversations through wiretaps or microphones. Necessary elements of the tort include an intrusion in the nature of prying which is offensive or objectionable to a reasonable man. Also, the thing into which there is an intrusion must be private. *Id.* at 808.

In this case, nothing was learned about McCall which was private or personal. The conversation dealt with Frazier and her legal problems and with how McCall proposed to resolve them. McCall spoke to her at his own risk, and Frazier was free to reveal the conversation to anyone. It is well settled that the attorney-client privilege "is not personal to the attorney but for the protection of the client." *Carter* v. *West*, 93 Ky. 211, 19 S.W. 592, 593 (1892). *Accord*, *Prichard* v. *U.S.*, 181 F.2d 326 (6th Cir.), *aff'd.*, 339 U.S. 975 (1950).

As to the allegation of trespass, we must conclude that neither the conduct of Frazier nor that

of the newspaper or its reporters was sufficient under this theory. 75 Am. Jur. 2d, *Trespass*, § 14, states:

> The fact that a professional man, merchant, or other person opens an office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission for such persons to enter, unless forbidden. Nevertheless, a person has the right, in his private business, to control it, and may select such persons as he chooses with whom to transact such business. He can prevent whom he pleases from entering his office; and when a person under an implied license has entered, he has the right to request such person to depart, and the latter thereafter has no legal right to remain. *Id.* at 18.

Thus, Frazier cannot be considered a trespasser. When McCall suspected a recorder on her person, he should have asked her to depart. By continuing the conversation, McCall consented to her presence and continued to discuss legal services for a fee. McCall argued that even if Frazier is considered an invitee, the newspaper and its reporters are trespassers. Any person who causes another to trespass is also liable therefor. 75 Am. Jur. 2d, *Trespass*, § 32, at 31. However, since Frazier was not a trespasser, this argument must fail.

Our focus as to libel is directed to the following paragraph contained in the March 17 article:

> The Times requested that Ms. Frazier tape record the conversation because the newspaper was attempting to investigate her allegations that McCall had offered to "fix" her case for $10,000.00. However, The Times found no indication of any "fix."

On August 19, the defendants published a report about this lawsuit. The following was said about the original story:

> The story also said that the newspaper found nothing during its investigation to substantiate a claim by Ms. Frazier that McCall had offered to "fix" her case for the $10,000.00 fee.

From a total of 115 paragraphs, McCall rests his entire libel claim on the 2 above-mentioned paragraphs. Although as an attorney McCall is not a public figure, and thus proof of malice is not required, this Court must still direct its attention to the articles in their entirety. "It is a fundamental principle in the law of libel and slander that the defamatory matter complained of should be construed as a whole . . ." *Commercial Tribune Publishing Co.* v. *Haines*, 228 Ky. 483, 15 S.W.2d 306, 307 (1929).

The March 17 article dealt with the ethical improprieties committed by McCall during his conversation with Frazier on March 10. The *Times* carefully and unequivocally reported that there was no evidence of any illegality and that McCall had repeatedly told Frazier that her case would not be "fixed," but would be resolved through legal processes. After reporting the tape-recorded conversation, the ethical infractions involved, and the fact that no illegality was involved, the *Times* explained to its readers how and why the conversation had been recorded.

The August 19 article concerning the filing of this lawsuit fits the same pattern. In the course of explaining the nature of McCall's claims for relief, the article synopsized both the complaint and the portions of the original article which form the basis of McCall's suit. Surely, if *The Louisville Times* had not printed the allegations in McCall's complaint, the journalists would have heard shouts of unfairness from McCall. He nevertheless contends that it was tortious conduct for the *Times* to repeat Frazier's allegations, even though her assertions are clearly refuted.

McCall argues that a speaker or publisher may not avoid liability for his defamatory statements or publications merely by attributing them to other persons and disclaiming any personal belief in the

truth of the assertions. While we agree that the press should not have an absolute constitutional privilege and immunity from libel for any method of gathering information and for any report it makes, we must recognize that the free flow of truthful information is at the heart of the First Amendment. *See, Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir.), *cert. den.*, 434 U.S. 1002 (1977); *Greenbelt Cooperative Pub. Assn.* v. *Bresler*, 398 U.S. 6 (1970). Balancing the conflicting interests of the individual against the interests of the free press and the public in these situations is often a difficult task. We must conclude, however, that these articles are accurate and truthful reports of what occurred and that the newspaper has not charged McCall with offering to "fix" a case. "The rule is well settled that, in a civil action for libel, the substantial truth of the publication is a complete defense . . . ." *Rollins* v. *Louisville Times Co.*, Ky., 90 S.W. 1081, 1082-83 (1906).

The appellees justify their means of investigation by stating that the tape recording was the only way to verify or dispell Ms. Frazier's allegations. Certainly, the public has a right to know if illegality exists in the judicial system. We at least applaud the effort to investigate. However, once it was determined that there was no foundation for the alleged bribery, it appears totally unnecessary for the newspaper to have published the initial article,

which cast McCall in a bad, although not false, light. If the appellees sincerely believed a breach of legal ethics or professional conduct had occurred, various remedies were available rather than a public spanking by newspaper.

Undoubtedly, Mr. McCall's professional reputation has been damaged, but the judgment of the Jefferson Circuit must be affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT:

Edward M. Post
812 Marion E. Taylor Building
Louisville, KY 40202

ATTORNEY FOR APPELLEE:

Edgar A. Zingman
2800 Citizens Plaza
Louisville, KY 40202

* * * * * * *

APPENDIX C

NO. 219331 JEFFERSON CIRCUIT COURT
SEVENTH DIVISION

JOHN TIM McCALL PLAINTIFF

v.

THE COURIER-JOURNAL & LOUISVILLE TIMES COMPANY, et at. DEFENDANTS

SUMMARY JUDGMENT

Upon motion of the Defendants pursuant to CR 56, the Court being sufficiently advised;

IT IS HEREBY ADJUDGED that there is no genuine issue of material fact remaining to be adjudicated in this case and the Defendants are entitled to a judgment as a matter of law.

IT IS FURTHER ADJUDGED that the Complaint, as amended, filed herein is dismissed with prejudice at the cost of Plaintiff.

/s/Michael O. McDonald
JEFFERSON CIRCUIT JUDGE

JEFFERSON CIRCUIT COURT
SEVENTH DIVISION
NO. 219331

JOHN TIM McCALL PLAINTIFF
VS: OPINION
COURIER JOURNAL and THE
LOUISVILLE TIMES DEFENDANTS

* * * * * * * * *

Richard Krantz and Tom Van Howe, admitted agents and employees of the Courier Journal and Louisville Times Company, operating as investigative reporters, contacted Kristie Frazier while on an investigation entirely unrelated to the subject matter of this litigation. The purpose of interviewing Kristie Frazier was related to a news story in connection with the local drug culture.

During the interview with Kristie Frazier the subject matter of this litigation was brought to light. The reporters were given information that aroused their interest. The information from Kristie Frazier was reduced to an affidavit which was signed on March 8, 1976. Also, information from Kristie Frazier's sister was reduced to affidavit on the same date. The facts sworn to in the affidavits are substantially as follows:

Ms. Frazier was represented by Attorney Richard Nash while under indictment on a drug

related charge, to which she proclaimed her innocence. Because of a prior drug conviction, she was responding to a motion to revoke her probation due to the new indictment. The second indictment was in a different court than the motion to revoke her probation. Attorney Nash advised Ms. Frazier she probably would be sent to prison because he felt there was nothing he could do for her based on the law and facts of the case. Ms. Frazier, on the advice of friends, contacted Mr. McCall. An office conference resulted in late January of 1976. Ms. Frazier's sister attended the conference. According to Ms. Frazier, a friend of hers, Jimmy Paul, told her that McCall could fix the case, and Jimmy Paul contacted Mr. McCall for the appointment. McCall told Ms. Frazier he was talking with her as a favor to Jimmy Paul. Mr. McCall told her he did not need any more cases, and she could not get out of trouble for $1500. Further, McCall told her that $5,000 wouldn't do any good, nor $7,000, but for $10,000, he would guarantee she would walk in court and walk back out. McCall needed $10,000 because 2 courts were involved. Also, he would have to talk to a narcotics detective. When she left his office she was convinced that if she had the money, he would fix the case. She said McCall was ready, depending on payment of the money, that day. The affidavit of Ms. Frazier's sister, Carolyn Shelburne, is substantially the same as Ms. Frazier's but it also states that they were to call McCall back on a Friday. They did not call back.

Armed with this information, reduced to a sworn statement, Krantz and Van Howe launched upon a way to substantiate it. They wanted to establish whether or not the local criminal justice system was subject to a fix. The reporters did not want to take the word of Ms. Frazier and her sister without corroboration, even though they had sworn statements. And if the circumstances were satisfactorily substantiated for the reporters' superiors, then the newspaper would supply the $10,000. The method used to obtain more proof was by tape recording. They arranged for Ms. Frazier to secrete an electronic recording device in her purse and had her set up another interview with Mr. McCall, which was accomplished.

The second office conference with Mr. McCall, which was recorded, has been reduced to a transcription which is filed in the record. The purpose of the second meeting was for Ms. Frazier to try to get Mr. McCall trapped into stating that he could fix the motion to revoke her probation in Judge Hayes' court and the new indictment in Judge Kunzman's court. The office conference, as the transcription reveals, did not substantiate a fix. Ms. Frazier informed McCall that he had secured the $10,000 from some people in Las Vegas, and she pretended to be concerned about how the cases were going to be handled. McCall explained, but throughout the conversation he affimatively stated

that the cases could not be fixed, and admonished her not to talk in those terms. He did state to her that he was going fishing that particular weekend with Judge Hayes, and further, that once the prosecutor knew he had a substantial fee, he (the prosecutor) would be sympathetic to his cause. Mr. McCall told Ms. Frazier that if he could not accomplish what he outlined, he would give back $9,000 (obviously to allay any misgivings on her part).

It is the Court's opinion that Mr. McCall was not going to fix the case and further, that he could not fix the case with Judge Hayes.

The reporters, after some additional inquiry, published an article which is filed as Exhibit A herein.

Subsequently, Mr. McCall filed suit. His complaint, in essence, alleged that the defendants, jointly and severally, wrongfully and negligently violated McCall's right of privacy by procuring Kristie Frazier to secretly record their conversation in his law office. That they invaded his privacy, without permission, and published only parts of the recorded conversation in the defendant's paper. That the article implied that McCall was unethical and dishonest in his profession, and that it placed him in a false light before the general public. Further, that the recording of the conversation, without his

consent and against his privacy, was an intrusion upon his solitude and seclusion. That the publication of the article did not accurately portray what actually took place in his office; and that the defendants acted maliciously and wantonly with reckless disregard for McCall's rights.

Subsequently, an Amended Complaint was filed alleging invasion of privacy -- intrusion; invasion of privacy -- recording conversation by deception; libel by portrayal in false light; and libel. The Amended Complaint, however, has been under attack by the defendants on technical grounds of not being properly filed.

The plaintiff's claims do not sound like the ordinary defamation suit. The plaintiff's theory is based on the spin-off torts of invasion of privacy known as "False light and intrusion." The Court assumes this approach was used in order to overcome the almost impossible position in which a plaintiff is casted under the decisions of *New York Times Company* vs. *Sullivan*, 376 U.S. 254, and *Curtis Publishing Company* vs. *Butts*, 388 U.S. 130, which, in essence, require a plaintiff to prove malice as well as libel.

The Complaint is bottomed on 2 alleged torts, the first being, "placing the plaintiff in a false light," and secondly, "intrusion upon seclusion." The Restatement of the Law, Torts 2nd, Section 652E, states:

Publicity Placing Person in False Light.

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy; if

(a) the false light in which the other was placed would be offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

In order to prevail under this theory there must be proven an invasion of privacy. Also, there must be proven falsity in the published matter. In the case of *Smith vs. Cincinnati Post and Times-Star*, 475 F. 2d, 730, the lawyer, Rufus Smith, had a telephone conversation, which was recorded, with Howard Yunker, wherein Smith indicated he could arrange a "fix" in a divorce case pending in Hamilton County, Ohio, Domestic Relations Court. The recording of the telephone conversation was without the knowledge of the lawyer, Smith. Yunker, the client or potential client of Smith, released the recording to the newspaper which then published it. The Court decided that "A party to a conversation is privileged to record it." And further, the Court stated, ". . . each party to a conversation, telephone or otherwise, takes the risk that the other

party may divulge the contents of that conversation, and should that happen, there has been no violation of the right of privacy." Also see *Chaplin* vs. *National Broadcasting Company, Inc.*, et al, 15 F.R.D. 134.

> . . . thus, unless it is an invasion of a legally protected right of privacy for one party to a telephone conversation to reveal the content of that communication, wire tapping by one party to a telephone conversation for the purpose of such a revelation cannot be an illegal invasion of privacy. It is unthinkable that the revelation of the content of a telephone conversation by one of the parties to it violates any legally protected right of privacy. Aside from a natural emotional revulsion which the use of such a device arouses, the fact of wire tapping adds nothing to plaintiff's privacy claim."

Further, in order to recover, under the proposition proposed, there must be falsity of the publicized matter. While truth is a complete defense to an action of libel, it is not a defense relative to an action for invasion of privacy. Still, however, the standard concerning the publication is pronounced in *Bell vs. Courier Journal and Louisville Times*, Ky. 402 SW2d 84 (1977): "What the law requires is that the publication be substantially true."

The Bell case, when read in conjunction with *Sweeney and Company vs. Brown*, 249 Ky. Reports

116, Ky. 60 SW2d 381 (1933), gives McCall no satisfaction on this theory where it states that:

> An innuendo, however, cannot enlarge or add to the sense or effect of words charged to be libelous or impute to them a meaning not warranted by the words themselves, or in the connection in which the colloquium does not fairly warrant. Words not libelous cannot be made so by innuendo.

The published article, when compared with the plaintiff's allegations, did not state that McCall was dishonest, nor did it state that he was unethical. A reading of the article only brought into focus a question of ethics, and the article itself disclaimed dishonesty by stating there was no evidence of a fix.

Lastly, on this theory, the law requires a reckless behavior. If the defendant had published the article solely on the sworn statements of Frazier and her sister, then there would be reckless behavior, in the Court's opinion. However, the attempt to substantiate the statements by recorded device, sneaky as it is, overcomes the reckless behavior claimed on the part of the defendants.

The second theory of McCall's case is premised on another spin-off of invasion of privacy. The Restatement of the Law, Torts 2d, Section 652B, *Intrusion Upon Seclusion,* states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.

McCall endeavors to classify Kristie Frazier as an agent of the defendant, Courier Journal and Louisville Times. What was the status of Kristie Frazier when she entered McCall's law office with the recorder on the second occasion? Frazier was not in the same status the employees of Time, Inc. were when they entered the office of the plaintiff, Dietemann. In *Dietemann vs. Time, Inc.*, 449 F. 2d 246 (9th Cr. 1971) the plaintiff, Dietemann, was engaged in the practice of healing with clay, minerals and herbs. Dietemann was a quack. In efforts to expose him, 2 Time, Inc. reporters for Life Magazine *fraudulently* obtained entrance into Dietemann's home office under the false pretense of being sent there by a friend. With concealed equipment, Dietemann's conversation was transmitted out of the home to another employee and government officials. Also, secret pictures were taken of Dietemann. The conversations and the pictures were later disseminated by the news-media. Dietemann subsequently was convicted of Quackery. Dietemann then filed suit for invasion of privacy and recovered $1000. The law in Dietemann is:

> . . .the First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

This Court does not quarrel with the law in Dietemann. However, the Court can find no intrusion here because Frazier was there, not as a trespasser nor an intruder, but as an invitee; she had been there previously as an invitee. The argument is raised that she was there as an agent of the newspaper, but so what? An agent may act for multiple purposes, and Frazier did. If she could obtain the proof necessary from McCall, which would secure her the the $10,000 from the defendant, she would have become McCall's client and an agent of the defendants. The Court is positive Ms. Frazier did not particularly care where she got the $10,000, nor how she got it. She wanted to stay out of prison. And at the same time, if she could do service for the ones who put up the $10,000 by snaring a lawyer or a judge in the process, she would have been doubly rewarded. Therefore, there was no intrusion into McCall's private affairs because they were also the affairs of Ms. Frazier. The Court is equally positive, from McCall's standpoint, that if $10,000 had surfaced, Kristie Frazier would have been represented by John Tim

McCall, in both cases pending in the Jefferson Circuit Court. A lawyer, an officer of the Court, discussing a public court with a potential client, is not in seclusion within the meaning of this cause of action.

The plaintiff's complaint does not state a cause of action based upon the facts and the law of this case. Dealt with herein is not publicity concerning private matters of one's private life.

Human dignity demands the rights of privacy be enforced, but when the rights of privacy encroach upon the most sacred trust the public possesses, namely, the judicial system, then those rights must give way.

Therefore, the plaintiff's complaint has been dismissed on the motion of the defendants for Summary Judgment.

/s/Michael O. McDonald
JUDGE

DATE: 3/12/79

cc: Edward M. Post
Edgar A. Zingman

* * * * * * * *

APPENDIX D

Supreme Court of Kentucky
80-SC-285-DG

JOHN TIM McCALL — MOVANT

V. On Review From The Court of Appeals
NO. 79-CA-1011-MR
Jefferson Circuit Court No. 219331

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, ET AL — RESPONDENTS

ORDER DENYING PETITION FOR REHEARING

Respondents' petition for rehearing is denied.

Palmore, C.J., and Aker, Clayton, Stephens, Stephenson and Sternberg, JJ., sitting. All concur.

ENTERED December 15, 1981.

/s/James Palmore
Chief Justice

* * * * * * *

APPENDIX E

The Louisville Times, Wednesday, March 17, 1976

Lawyer's 'guarantee' to keep woman free for $10,000 ethical?

By RICHARD KRANTZ and
TOM VAN HOWE

Louisville attorney Tim McCall, in possible violation of his profession's ethics, told a defendant in a criminal case here that for $10,000 he would either keep her out of jail or refund most of her money.

"(If) you don't go to jail or the penitentiary, then I'll charge you 10 grand. If you do, then. . .I'll charge you $1,000 for my trouble." McCall said last week to Kristie Frazzier, 27, who is charged with trafficking in narcotics.

". . . In other words" McCall said. "I'm guaranteeing you for nine grand more that you won't--that nothing will happen to you."

McCall, 34, a cochairman of the Louisville Bar Association's Criminal Practices Committee, denied making any unethical guarantee to Miss Frazier, or doing anything else unethical involving her case.

According to a tape recording of the conversation between McCall and Miss Frazier, McCall also told the woman that if she raised $10,000 he would tell a prosecutor and a judge "that I'm making a substantial fee, an maybe the prosecutor will be sympathetic to me, and he will, too . . . they'll help me, and that'll help you"

When Miss Frazier expressed concern about her court appearance Monday and the possibility of her going to jail this week, McCall told her, "Hey, don't worry about it--I'm going fishing with (Criminal Court Judge John P.) Hayes Friday. All weekend."

Any such statements made by a lawyer to a prospective client may violate two rules of the Code of Professional Responsibility of the American Bar Association (ABA), according to ABA spokesmen.

One rule prohibits lawyers, under penalty of bar association discipline, from agreeing upon a 'contingency fee" in a criminal case.

A contingency fee is, in effect, when an attorney sets a certain fee if the case is won, and a lesser fee if the case is lost.

The other prohibits lawyers from implying that they are able to "influence improperly" any tribunal or public official.

The conversation between McCall and Miss Frazier occurred last Wednesday in McCall's office. At the request of the Louisville Times, Miss Frazier recorded the conversation on a tape recorder in her purse.

During the conversation, Miss Frazier stated at least twice that McCall would be using the $10,000 she would raise to "fix" the case. After each such statement McCall stated that no "fix" or other illegal action, such as a payoff, would be involved. Once McCall said, "It's not a fix. Don't talk like that."

At another point, he said, "The $10,000 would be my legal fee and I'll figure out some way to get you out of this if I have to import the damnedest lawyer in town to do something.

In a telephone interview Monday, McCall said: "I don't think that any statement I made to Miss Frazier violates any code of ethics for attorneys or judges. I don't believe that I was unethical with her or agreed to do anything illegal."

McCall said he made no absolute guarantees of the results of the case to Miss Frazier.

"A guarantee," he said, "is when you tell somebody it is going to be that way -- and no other alternative. I never told her that."

'Not a contingent fee'

McCall also said that while a "purely contingent fee" is unethical in a criminal case, his proposed arrangement with Miss Frazier was "not a contingent fee."

He said a contingent fee can be based on the outcome of a case or on the amount of work involved. He refused to discuss, however, whether his statements fell into either category.

McCall said the only reason he even agreed to talk to Miss Frazier about her case was because "two good clients of mine called me and asked me to help this girl out."

McCall added that his statement to Miss Frazier-- that she shouldn't worry, because he was going fishing with Judge Hayes--meant "only that I was going fishing with Judge Hayes--and I didn."

McCall said he never mentioned Miss Frazier's name on the fishing trip and added that he would not discuss a case out of court with a judge unless a prosecutor was present.

Judge Hayes, asked yesterday about the weekend fishing trip with McCall, said there was no conversation between himself and the attorney about Miss Frazier's case.

McCall said other attorneys, including a prosecutor, had been invited to accompany McCall and Hayes on the trip. But, McCall said, only a policeman accompanied them.

3 authorities consulted

The Times consulted two national authorities and one local authority on ethics in the legal profession.

Two of them said they would comment only if their names were not used. Both of these persons were associated with legal ethics committees on a national or local level.

All three agreed that there seemed to be a contingency fee involved in the case described to them by The Times. They said this was clearly unethical.

One man queried was Philadelphia attorney Lewis Van Dusen, the national chairman of the ABA's Ethics Committee.

"That's easy," Van Dusen said. "Contingent fees are not permissible in a criminal case." They are, however, permissible and common practice in civil cases, he said.

Two of the attorneys were asked whether it was proper for a lawyer to say not to worry because he is going fishing with the judge, and to say that he would try to seek sympathy by telling of his high fee.

One of them said that this seemed to be suggesting to a client that the lawyer could use "improper influence." He said he would have to know the full facts to be certain. The other said he could not comment without knowing the full facts.

All three experts said that they would have to know the precise facts of the case in order to comment further.

Specializes in criminal law

McCall, of 3400 Winchester Drive, specializes in the practice of criminal law. Early in his career, he served as both an assistant city attorney and as an assistant commonwealth's attorney. He is a 1966 graduate of the University of Louisville School of Law.

McCall on Monday asked Commonwealth's Atty. David Armstrong to bring the entire matter--including the actions of The Times in obtaining the tape--before a grand jury.

Armstrong plans action

Armstrong said yesterday that he intends to bring it before the grand jury and that he wants to determine if in fact, any unethical practices on the part of an attorney took place.

He also said he wants to determine if the press acted unethically or illegally by promoting or encouraging a bribe. He said if the newspaper or its representatives are guilty, he intends to prosecute.

He said he will prepare subpoenas to require the testimony before the grand jury of Times reporters who wrote the article. He said he will also seek to obtain the tape recording of the conversation between McCall and Miss Frazier.

The Times requested that Miss Frazier tape-record the conversation because the newspaper was attempting to investigate her allegations that McCall had offered to "fix" her case for $10,000. However, The Times found no indication of any "fix."

The Times first became interested in the case while interviewing Miss Frazier on another matter on March 3. She told reporters she could avoid going to jail if she could raise $10,000 to give to McCall.

She said that she went to McCall last January after some friends told her that he might be able to keep her out of jail.

At the January meeting in McCall's office, according to a sworn affidavit Miss Frazier gave to The Times, McCall told her that he would represent her, with no guarantees, for $1,500.

But for $10,000, Miss Frazier said in her affidavit, he would guarantee that she would "walk in the courtroom and turn around and walk back out."

Backed by witness

A witness to that meeting, who asked not be named, has also provided The Times with an affidavit supporting Miss Frazier's statements. However, McCall disputes Miss Frazier's account of that meeting.

Both Miss Frazier and the witness said they believed, based on the January conversation, that McCall intended to "fix" the case for $10,000.

After hearing their statements and receiving their signed affidavits, The Times decided to pursue the investigation.

The investigation was designed to determine if Miss Frazier's case was being handled illegally, and to see if the attorney had, in fact, made improper offers to a prospective client.

The Times asked Miss Frazier if she would agree to go back to McCall's office, with a tape recorder provided by The Times in her purse, to see if McCall would repeat what he had allegedly told her in January.

The Times told Miss Frazier that if the attorney indicated to her that he was actually going to "fix" the case, the newspaper would consider providing the $10,000 in an effort to detect any possible mishandling of the case.

The Times told Miss Frazier that the decision to provide the money would be based on what McCall said on the tape, and if there was a definite indication that a fix or bribe might be involved.

She was not instructed by The Times to mention a "fix" or a bribe, but just to say what she ordinarily might say in such a conversation.

She was told only one question to ask. That question was, "Can't this case be handled in the regular way for $1,500, without a payoff, or does it have to take $10,000 to keep me out of jail?"

Times reporters felt that such a question might elicit an answer from McCall which would indicate whether the case was to be handled in a normal, legal fashion, or possibly in an illegal way.

The Times also told Miss Frazier that if bribery of a court official was indicated, this would be illegal for her or The Times to participate in.

Following the second meeting between Miss Frazier and McCall, last Wednesday, the tape recording of their conversation was evaluated by Times editors, reporters and the newspaper's attorneys.

The tape did not indicate payoffs that McCall contemplated to officials to dispose of the case, and the newspaper decided not to provide the money.

Indicted last April

Miss Frazier was indicted by a Jefferson County grand jury on April 30, 1975, on a charge of selling a quantity of cocaine to an undercover narcotics agent of the Jefferson County Police Department.

She has steadily maintained she is innocent of the charge, which is pending before Criminal Court Judge George Kunzman.

After her indictment, Miss Frazier hired attorney Richard Nash Sr. to represent her.

Nash said he advised Miss Frazier to plead guilty to the charge and accept the commonwealth's offer of one year's confinement in the Kentucky Correctional Institute for Women at Pewee Valley.

Nash told The Times he feared that if the case went to trial a jury would convict her. Miss Frazier could then be sentenced to five to 10 years in a state prison.

Miss Frazier was convicted almost five years ago of possession of marijuana, and Judge Hayes sentenced her to six months in jail. The sentence was probated for five years, however, and she did not spend any time in jail.

Following her latest arrest on the charge of trafficking in narcotics, Judge Hayes filed his own motion to revoke her probation.

Nash said he felt her changes for freedom were so poor that he told her, before she appeared in court Monday, to "come prepared to go to jail."

Nash said he thought her best bet would be to accept a year at the Pewee Valley facility by pleading guilty to the present charge, rather than face six months of more disagreeable confinement in the county jail by having her probation revoked by Hayes on the 1971 conviction.

Miss Frazier, knowing the high likelihood of her going to jail, turned to McCall last January, seeking a way to keep her freedom.

McCall disagrees with Miss Frazier's account of their first discussion. McCall told The Times that he flatly refused to represent her at that time and "sent her back to her attorney (Nash)."

However, the tape recording made at last week's meeting indicates that McCall did not flatly refuse earlier to represent her. There are two references on the tape to their first meeting.

The first refers to the fee McCall quoted her.

"Yeah, now look," Miss Frazier said. "Okay, for 15--you told me you would represent me for $1,500. . ."

"Fifteen hundred dollars," McCall said interrupting, "no guarantees, no nothing."

"No guarantees," Miss Frazier responded, "no nothing. Right.'

The second reference to their original conversation came when McCall asked Miss Frazier who arrested her.

After naming the officer, she added, "You said you were going to talk to him."

"I didn't talk to him," McCall responded, "because you, I, never came back to talk to you about it."

During their taped conversation last Wednesday, McCall said he would represent Miss Frazier under "three conditions."

"They are," McCall said, "Number one that (attorney) Nash has no objections to it. . .

"Number two," he continued, "that it's between you and myself, and nobody else, discusses the fee. . ."

"Number three," McCall said, "is you have to take my word or you can trust (one of his clients) or somebody that knows me that if I get you out of it. By getting you out of it I mean you don't go to the penitentiary. It may be a probated sentence, it may be you have to leave the jurisdiction. If you don't go to jail or the penitentiary, then I'll charge you 10

grand. If you do, then I won't charge you--I'll charge you $1,000 for my trouble. But, in other words, I'm guaranteeing you for nine grand more that you won't, that nothing will happen to you."

"So, if I blow," McCall added, "I have to give you your money back. . . . I'll say that you're going to be out of it. Something could possibly go wrong, and if it did, I'd give you your money back. It's that simple."

Later, McCall impressed upon Miss Frazier that she should not tell Nash about their arrangement.

". . . I just don't want anybody to know about it. Now I'm serious about that. I don't want Nash, I don't want any policemen, any judges--I don't want nobody to know about it but me. It's between you and me."

After McCall told Miss Frazier that he was simply doing her a favor, that he didn't need the extra business, she mentioned that she was to appear in court the following Monday (this week).

"I'm a nervous wreck," she said. "They're going to put me in jail, and it's Monday. See? It's Monday. Monday."

"Monday's the 15th?" McCall asked. "Do you mean it's scheduled for trial Monday?"

"That's what I mean," Miss Frazier said. "You got to do something. If I could get you the money Friday. . ."

"Hey," McCall interrupted, "don't worry about it--I'm going fishing with Hayes Friday. All weekend."

Moments later, McCall instructed Miss Frazier not to say anything about his fishing trip with Hayes.

". . . Going around telling people he and I are friends (could) put him on the spot," McCall said. "He's a very honest judge. I'm going to tell you, believe it or not, the only way I could straighten this out is through legal recourse and the fact that I can tell him that I'm making a substantial fee, and maybe the prosecutor will be sympathetic to me, and he will, too . . . they'll help me, and that'll help you."

"Okay," Miss Frazier, said, "consider it done."

"I'll consider it done," McCall said, "when you come in here."

"With the $10,000," Miss Frazier said.

"Yeah," McCall replied.

Miss Frazier did not produce the $10,000, however, and Nash remained her attorney. Monday, when she appeared in court, she was offered the agreed upon deal from the commonwealth--one year in prison in return for a plea of guilty.

Miss Frazier reluctantly signed the necessary court papers. She said aloud that it was "ridiculous" to plead guilty to a crime she did not commit.

Judge Kunzman, noting that Miss Frazier had been talking in court to a reporter, then said he would refuse to accept the guilty plea.

Kunzman said he would not accept a plea of guilty from a defendant who was protesting her innocence at the same time.

As a result, both the matters in Hayes court and in Kunzman's court were continued to June 14. Kunzman said she would stand trial at that time.

Opposition

Supreme Court, U.S.
FILED
APR 16 1982
ALEXANDER L. STEVAS
CLERK

81-1741

No.

Supreme Court Of The United States

October Term, 1981

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, RICHARD KRANTZ and TOM VAN HOWE - - - - - **Petitioners**

versus

JOHN TIM McCALL - - - - **Respondent**

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD M. POST
812 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-5760
Counsel of Record for Respondent

Of Counsel:

JAMES E. MORREAU, JR.
TAUSTINE, POST, BERMAN, FINEMAN & KOHN
812 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-5760

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

This is a case in which the Petitioners obtained a summary judgment at the trial level, only to have the Kentucky Supreme Court ultimately decide that the Respondent was entitled to a trial. If this Court grants the Petition, it will have to decide whether the Petitioners' Constitutional rights were abridged by the Kentucky Supreme Court's decisions that:

1. The media has no Constitutional privilege to repeat a defamatory falsehood which is uttered by a private individual during a news interview and which concerns another private individual.

2. Where the media, with actual malice, falsely portrays facts which are defamatory on their face, the victim of these statements can, as an alternative to libel, make a claim based on invasion of privacy due to the publicity which has portrayed him in a false light; further, that the facts falsely portrayed are interesting reading (i.e., "newsworthy") will not automatically bar the plaintiff's claim.

3. The Court might in the future uphold the tort described in the preceding paragraph in a case in which the factual circumstances differ from those in this case, even if what is falsely portrayed is not strictly defamatory, but would only be highly offensive to a reasonable person.

4. In an action for defamation brought by a private figure plaintiff, the necessary fault requirement is met by a showing that either: (a) the publisher did not have a good faith belief in the truth of the defamation; or (b) the publisher had a good faith belief in the truth of the defamation, but this belief was the result of his negligence in failing to conduct a reasonable investigation into the truth or falsity of the defamation.

5. Notwithstanding a defamed plaintiff's burden of establishing "fault", it is Constitutionally permissible for

a state to place the burden of proving the truth of the defamatory statement on the defendant, where he wishes to rely on truth as a defense to the defamation action.

The Respondent contends that this Court should not issue the Writ because the above holdings by the Kentucky Sppreme Court are proper interpretations of the law and are not violative of the Petitioners' Constitutional rights.

TABLE OF CONTENTS

PAGE

Table of Authorities iv

Statement of the Case 1–17

Statement of Facts 1–16
Statement of Proceedings Below 16–17

Argument 17–27

I. The Kentucky Supreme Court's Rejection of the Defense of Neutral Reportage Was Proper 18–22

II. There Is No Constitutional Basis for Questioning the Kentucky Supreme Court's Adoption of the Tort of Invasion of Privacy by False Light Portrayal 22–24

III. McCall Was Not a "Limited Public Figure" and There Is No Constitutional Impediment to Applying the Simple Negligence Standard in This Case 24–25

IV. The Question of Which Party Has the Burden of Proof as to the Truth or Falsity of the Defamatory Publication Has Already Been Decided by This Court 25–27

Conclusion 28

Appendices 1a–9a

A. Excerpt From Plaintiff's Brief to the Court of Appeals, Commonwealth of Kentucky 1a–3a

B. Excerpt From Plaintiff's Brief to the Supreme Court of Kentucky 4a–6a

C. Count Three of Plaintiff's Amended Complaint ... 7a–9a

TABLE OF AUTHORITIES

PAGE

Cantrell v. *Forest City Pub. Co.*, 419 U. S. 245 (1974) . 17, 22

Edwards v. *National Audubon Society, Inc.*, 556 F. 2d 113 (2nd Cir. 1977), cert. den., 434 U. S. 1002 (1978) 19

Gertz v. *Robert Welch, Inc.*, 418 U. S. 323 (1974) 23, 24, 25, 27

Greenbelt Coop. Pub. Asso. v. *Bressler*, 398 U. S. 6 (1970) 19, 20

New York Times Co. v. *Sullivan*, 376 U. S. 254 (1964) 19, 21, 25

St. Amant v. *Thompson*, 380 U. S. 727 (1968) 21

Time, Inc. v. *Firestone*, 424 U. S. 448 (1976) .. 20, 21, 26, 27

Time, Inc. v. *Hill*, 385 U. S. 374 (1967) 17, 22

Time, Inc. v. *Pape*, 401 U. S. 279 (1971) 19, 20, 21

Supreme Court Of The United States

October Term, 1981

No.

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY
RICHARD KRANTZ and
TOM VAN HOWE - - - - - *Petitioners*

v.

JOHN TIM MCCALL - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May it please the Court:

For the reasons set out in the following Brief, the Respondent respectfully prays that this Court not issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Kentucky entered in this proceeding on October 13, 1981.

STATEMENT OF THE CASE

Statement of Facts[1]

In late January, 1976, Kristie Frazier appeared in McCall's office to seek information on the viability of McCall's representation of her interests in negotiating pleas in two criminal matters then pending before the local Circuit Courts. At this time, Frazier had already retained another attorney, Mr. Richard Nash.

Pursuant to her inquiries, McCall informed Frazier that if she were dissatisfied with Mr. Nash's representation, he would represent her in the matters in question for a fee of $1,500.00. However, he advised her that she ought to remain with Mr. Nash. (McCall Dep. 83-84; see also Frazier Affidavit, T.R. 136, expressly verifying McCall's testimony.)

Approximately a month after Frazier's meeting with McCall, she was interviewed by the Respondents in connection with a story they were preparing on the local drug traffic. During the course of the interview, Frazier mentioned the pending drug charges which she had discussed with McCall, and further disclosed that if she had but $10,000, she would not be imprisoned on these violations. She explained that, for such a sum, any case before any judge could be "fixed", and that

---

[1]The Petitioners contend they were entitled to summary judgment, and that the Trial Court's entry of summary judgment in their favor should have been affirmed by the Kentucky Supreme Court. Under these circumstances, however, Respondent submits that this Court should consider the disputed facts in the light most favorable to the Respondent, rather than the Petitioners.

any lawyer would "fix" a case. Hearing this, the reporters inquired of Frazier the basis for her so thinking, to which she retorted that McCall had stated that for this sum he could keep her out of jail. She then discussed her meeting with McCall, claiming that McCall had declared that for $10,000 he "could almost guarantee [her] that [she] would not have to go to jail." (Frazier Dep. 5, 8, 14, 28-31, 99-100)

Pursuing the matter, the reporters asked Frazier whether she would not agree with them that such a statement conveyed the idea that McCall was offering to "fix" her case. (Krantz-Van Howe Dep. 29, 47) In response to this Frazier reported that she "assumed" part of the $10,000 would "probably" be applied to something other that McCall's fee, and that "maybe" Judge Hayes would be the recipient of a portion of it. (Frazier Dep. 8-9)

McCall denies having spoken or comported himself such that, at the January meeting, he would have given Frazier any basis for believing that he had suggested a "fix", or a "guarantee" of any kind, for any amount. Furthermore, McCall denies quoting, or even suggesting, a fee of $10,000. (McCall Dep. 81, 83, 84, 158) McCall's version of the January meeting is corroborated by the Petitioners' tape recording of the second meeting between him and Frazier. (This is discussed *infra.*)

The reporters confess to knowing that in their interview with Frazier, she was merely expressing her opinion that McCall would fix the case, and that she

at no time stated that McCall had said anything to the effect of "I'll fix the case." (Krantz-Van Howe Dep. 28)

Despite this knowledge however, and despite Frazier's somewhat paranoiac comments regarding the judicial system, Krantz and Van Howe made a pact with Frazier. She was to: (1) supply them with an affidavit concerning McCall's remarks at the January meeting; and (2) return to McCall's office in an effort to get him to say, on tape, that he would fix the case. In exchange, they were to: (1) give Frazier $10,000; (2) promise her that she wouldn't be involved in a bribery charge; and (3) promise her that they would see to it that the pending motion to revoke her probation was "taken care of." (Frazier Dep. 11, 62, 64)

Frazier accepted the Reporters' offer and, on March 8, 1976, executed an Affidavit which purportedly set forth the occurrence of events that had transpired in McCall's office in January. In this affidavit however, Frazier's "almosts", "maybes" and "probablys" are deleted and she swears that she "*knew* from talking to [McCall] that if [she] had the money, he *would* fix it.' (emphasis supplied) However, the Affidavit did not state that McCall had *in fact* offered to fix the case.

On this same day, March 8, while still in the reporters' offices, Frazier telephoned McCall's office and made an appointment to see him on March 10. Frazier admits she set up this meeting not to become McCall's client, but for the *sole* purpose of providing her with

the opportunity to get McCall to say on tape that he would fix her case. (Frazier Dep. 52, 83) She had no intention of hiring McCall to represent her (Frazier Dep. 52), and prior to the Petitioners' solicitation, it had been her intent to follow McCall's advice and stick with Mr. Nash as her attorney. (Frazier Dep. 50-52)

Prior to the scheduled March 10 appointment with McCall, the reporters took Frazier through a protracted rehearsal session, wherein one of the reporters substituted as McCall, to familiarize Frazier with the techniques she was to employ to prod McCall into agreeing to a "fix". (Krantz-Van Howe Dep. 41, 75-77; Frazier Dep. 73-74) Then, on the appointed day, Frazier met for the second time with McCall and proceeded to record the entire conversation on the hidden tape recorder which had been supplied her by the reporters.

From Frazier's tape recording, the Petitioners made a "transcript" of the conversation. Petitioners quoted extensively from this transcript in the Courts below, and again in their Petition. Thus, it is important for this Court to understand that the transcript is an unverified, ex parte version of the conversation and that they have filed no affidavit, or testimony, in support of its accuracy. Moreover, Petitioners' "quotations" from this transcript are often out of sequence, usually out of context, and always misleading.

While the issue of the proper contents of the transcript is central to several points in this case, it cannot be questioned that the tape itself verified McCall's testimony that at the January meeting with Frazier

there had been no mention of a $10,000.00 fee, nor of a "guarantee" of any sort.

Even Petitioners' transcript (T.R. 77) shows that Frazier began the March 10 conversation, that she was the first to mention a $10,000.00 fee, and that McCall's response was incredulous:

> Frazier: I think, now look, they want to give me a year. They want me to cop out and take a year. I got somebody that I can get the ten thousand dollars from.
>
> McCall: Ten thousand dollars? Who quoted you that kind of fee? Me?
>
> Frazier: Yes.
>
> McCall: I did?
>
> Frazier: Yes.

Merely reading the transcript indicates that McCall was surprised by Frazier's mention of a $10,000.00 fee. Moreover, *hearing* the tape clearly imparts to the hearer the shock registered in McCall's voice. This was verified by Petitioner Van Howe himself. (Krantz-Van Howe Dep. 184)

The transcript shows McCall's next comment to be: "Get you out for $10,000 I probably said. That's just a figure of speech." (T.R. 77) However, the *tape* clearly indicates that McCall actually said: *"When did I say that? I couldn't* get you out for $10,000, I probably said. That's just a figure of speech." McCall's attorney, who heard the tape, filed an affidavit in which he swears that the italicized words, though omitted from the Petitioners' transcript, are clearly audible on the tape. (T.R. 159, 190)

From the foregoing as well as from the discussion which follows, it is patently obvious that the $10,000 was not "the enormously increased fee [McCall] had demanded" for a guarantee (Petition, p. 4), but was instead an enormously increased fee which Frazier was dangling before McCall, coupled with *her* demand for a guarantee, as part of the Petitioners' scheme to get McCall to say he would fix a case.

In addition to the fact that it was Frazier who first mentioned a $10,000 fee, it was also Frazier who first made reference to a "guarantee". She said: "Now they're going to give me $10,000. And I will give you $10,000, but I want a guarantee." (T.R. 80) Frazier informed McCall that she had to have a guarantee because she planned to get the money from some "crazy gamblers" in Las Vegas, in exchange for her performance of "services" (T.R. 80), and it was implied that she would be killed if these gamblers supplied her with the $10,000 and she subsequently failed to render the necessary services because she had been imprisoned. (T.R. 88, 94) Each time Frazier offered McCall the $10,000, she conditioned the offer on the receipt of a guarantee.

Respondent freely admits that once Frazier offered him a $10,000 fee, he endeavored to find some way to satisfy Frazier's demands and earn the fee. Thus it was that, after hearing Frazier repeatedly proclaim her innocence, McCall recited his "guarantee". This was nothing more than a statement that if Frazier did not go to jail or the penitentiary, his fee would be $10,000, but that if she did, he would return $9,000.

Hence, it was in response to Frazier's demands for a guarantee that McCall maintained that he could guarantee Frazier that she would be able to avoid bodily harm at the hands of the gamblers ("nothing will happen to you"), since if she had to go to jail she would be able to return their money. However, McCall expressly told Frazier he was *not* guaranteeing her freedom.

In an obvious attempt to misportray these events, Petitioners' transcript shows McCall to say, "I'll guarantee you . . . I am going to get you out of this," and that if he didn't, he would return the money. However, a correct transcript of the tape shows that McCall actually said:

> I guarantee you *not* that I'm going to get you out of it—*not* going to get you out of this. But that if you pay me the $10,000 and I don't get you out of it, I'm going to give you the money back. (Emphasis supplied) (T.R. 159, 190)

Ethical Matters

The Petitioners present the case as one in which it should be taken as true that McCall was not only guilty of "serious ethical misconduct", but further that he has admitted as much. Such is not the case.

It is questionable whether McCall actually entered into a contingent fee arrangement. Frazier was certainly not a client, nor even a prospective client, when she saw McCall in March. Further, the tape reflects that no arrangement was to be made until Frazier produced the $10,000 (T.R. 101-102) which, of course, she never did. Without regard to technicalities, however,

the seriousness of any violation is questionable in view of the fact that it was the Respondents who concocted the elaborate scheme which induced McCall to say what he did.

Concerning the fishing trip with the judge and prosecutor, where McCall was to tell them of his large fee, the context of the tape clearly indicates that these things were said at the end of the March meeting, and only after Frazier told McCall that her court date was a mere four days away. McCall was shocked at this and Frazier feigned alarm at McCall's surprise, and inquired of him as to whether that was a problem. McCall immediately recognized the need for a continuance, and it was in connection with this that he told Frazier not to worry, that he was going fishing with the judge, and he implied that he would be able to get a continuance by telling the judge and prosecutor that he could earn a large fee if he had time to prepare the case. Contrary to what is implicit in the Petition, the tape does not suggest that McCall was either going to discuss the merits of the case or ask that Frazier's ultimate sentence be predicated on the fact that he might get a large fee. Finally, we note that even Petitioners' own news story could report only that the experts they had consulted were unable to maintain that McCall's conduct in this regard was unethical, in the absence of more facts.

In addition to a reprise of the supposed ethical violations, which were so labeled in the article, the Petition makes several false statements in an effort to similarly characterize McCall's other actions.

McCall *never* said that his fee "for handling the case in the normal way would be $1,500." The $1,500 fee was what he was going to charge Frazier to engage in plea bargaining on her behalf, not to fully represent her. The remark, "no guarantees; no nothing" was merely McCall's way of saying that he was not certain what kind of deal he could negotiate on Frazier's behalf (obviously, it was an unfortunate choice of words, in light of the ensuing events). Moreover, McCall never "pledged" that he would guarantee Frazier that she would not be incarcerated"; rather, he expressly told her that he could *not* guarantee that result. (See p. 5, *supra*)

Neither did McCall state that he would employ his "best efforts only if paid ten times the usual rate". The tape reflects that for $10,000 McCall contemplated a trial, potential appeals, and the employment of another attorney, should that be necessary. (T.R. 79) When Frazier began dangling about the offer of a $10,000 fee, coupled with numerous statements of how her innocence could be proved in a full scale trial, what ethical obligation was there on McCall's part to say that the figure was too high?

Petitioners imply that McCall *must* have been guilty of wrongdoing because he expressed a desire for secrecy. Thus, they tell this Court that "McCall was adamant that Ms. Frazier could not discuss this money-back guarantee with anyone." (Petition, p. 4) This, however, is utter fantasy. The Petitioners' own jaded transcript clearly contradicts this claim.

McCall told Frazier that he would represent her only if Mr. Nash had no objection; *then* he demanded secrecy (only about the size of the fee—*not* the "guarantee"). However, as clearly indicated by the transcript, McCall further told Frazier that he didn't care if she told her friends, or if she paid him by check. The secrecy is always tied to Nash's finding out about the fee, and it is clear that McCall simply didn't want *Nash* to find out that McCall might be going to make a $10,000 fee on a case which Nash was going to have to step out of in favor of McCall. Admittedly, this course of action lacks professional courtesy on McCall's part, toward Nash, but it certainly does not indicate the devious illegality which the Petitioners would like to impute.

The Petition deliberately recites the facts as though McCall had admitted below the charge that he had committed "serious ethical violations." Such a characterization is patently false. What McCall said in his pleadings below was that *if* Frazier had been a client (which she was not), then *some* of the things which he said were *either* unethical *or* were things which he shouldn't have said.[2]

---

[2]To bolster the claim that McCall admitted the wrongdoing charged, the Petition claims that McCall "altered his stance as to his own misconduct" and "profusely apologized" for it in one Court, while in another Court claiming he had merely been "chivalrous" toward Frazier. (Petition page 15, footnote 9) The Petitioners cite McCall's briefs below in an attempt to yield credence for these misstatements. However, we have attached the cited pages in Appendices A and B. A scant glance by this Court will show conclusively that: (1) no apology, profuse or

(Footnote continued on following page)

The Petitioners' Misstatements Concerning the Libel Claim

(1) Petitioners are wrong. The article did not "accurately report" Frazier's charge. The article reported Frazier's allegation as "McCall had offered to 'fix' her case for $10,000." Thus, the allegation as printed was one of fact, not opinion. However, at no time did Frazier, or her sister, ever say that *in fact* McCall had offered to fix the case, nor did they even say they *believed* that McCall had *in fact* offered to fix the case. The most they said was that, based on his alleged comments that he would guarantee Frazier that for $10,000 she would walk into the courtroom and turn around and walk out again, *they believed* McCall would, or could, fix the case.

Moreover, the article failed to mention that an important basis for Frazier's opinion was simply that McCall was a lawyer, and that she believed any lawyer would fix a case. Clearly, this omission would have a bearing on how readers perceived both Frazier in general and, more importantly, her allegations about McCall in particular.

(2) Petitioners are wrong. The article did not make clear that Frazier's allegation that McCall had offered to fix the case had been clearly disproved by the tape. The Times did not unequivocally report that it dis-

(Footnote continued from preceding page)

otherwise, was made; (2) no chivalrous concern for Frazier was expressed; (3) precisely identical claims were made in both the Kentucky Court of Appeals and the Kentucky Supreme Court; and (4) the Petitioners' propensity to stray from the truth in a premeditated attempt to mislead this Court is ubiquitous.

believed Frazier's allegation; rather, the article was deliberately vague in its references to what the tape clearly showed about the January meeting.

Extremely little exoneration was given McCall by the statement: "However, the Times found no indication of any 'fix'." First, that statement only refers to what transpired at the second meeting—the readers were left to form their own opinion regarding what McCall had said and done at the first meeting.

Second, there is quite a difference between saying, "we don't find any indication that what X says is true," and saying, "we find that what X says is untrue." The latter was clearly the case here.

Third, in reporting *its own* conclusions about the taped conversation, as opposed to reporting Frazier's conclusions about the first conversation, considerable ambiguity was left by these paragraphs of the article:

> Following the second meeting between Miss Frazier and McCall, last Wednesday, the tape recording of their conversation was evaluated by Times editors, reporters and the newspaper's attorneys. The tape did not indicate payoffs that McCall contemplated to officials to dispose of the case, and the newspaper decided not to provide the money.

By the use of the language "the tape did not indicate," the sentence is made ambiguous. The fact that the *tape* did not indicate payoffs does not mean that no payoffs at all were indicated, which in fact was the case. Thus, readers are left to wonder whether the tape exonerated McCall, as it did, or whether it merely contained no evidence one way or the other in this

specific case. In fact, one reasonable interpretation of the paragraph would be that "[t]he tape did not indicate *which* payoffs that McCall contemplated . . .", thereby leaving room for readers to imply that payoffs were indeed contemplated, but that the specific ones were not mentioned on the tape. In light of the clear meaning expressed on the tape, the language in the article should have been, "The tape clearly indicated McCall did not contemplate any payoffs." Moreover, the decision by the newspaper "not to provide the money" appears to be grounded on the fact that the tape didn't indicate specific payoffs, rather than on a conclusion "by Times editors, reporters and the newspaper's attorneys" that in fact there never were to be any payoffs.

(3) Petitioners are wrong. The libel claim is based on more than one paragraph. The Petition refers to a "background paragraph"[3] in the article, the first sentence of which said, "The Times . . . was attempting to investigate (Frazier's) allegations that McCall had offered to 'fix' her case for $10,000." This paragraph was not the "sole" basis for McCall's libel claim.

---

[3]The Petition makes it a point to note that "This portion of the article appeared on page 18 of the newspaper." (p. 7) The only reason we can see for including such a statement is to try to suggest that the "background paragraph" appeared in an inconspicious location in the newspaper. Although we do not mean to make an issue in this Court over the placement of the "fix" allegation, we do wish to point out to the Court the Petitioners' propensity to twist a true statement to create a false impression. While it is true that the allegation appeared on page 18, page 18

(Footnote continued on following page)

While the report of Frazier's allegation that McCall was going to fix her case, standing alone, would be a sufficient basis for the libel and/or the false light portrayal claims, the libel claim is also based on the fact that when the article is taken as a whole it imputes illegal activity to McCall at *both* meetings. This is so notwithstanding Petitioners' generosity in stating that, based on the tape of the second meeting, they "found no indication of any fix," or that "the tape did not indicate payoffs that McCall contemplated."

The article omits crucial evidence which the reader needs to form an accurate opinion based on the facts; and the "facts" which are related in the article (and in the Petition) are so presented as to give the reader the impression that McCall was indeed guilty of the wrongdoing alleged, but that when the conversation was taped he had simply been smart enough, or lucky enough, to say there would be no "fix."

The article spoke repeatedly of a "guarantee of freedom," but it did not report that: it was Frazier who first mentioned a guarantee; she demanded a guarantee as a condition of employment; the tape indicated there had been no mention of a guarantee at the first

---

(Footnote continued from preceding page)

was the outside back page of the news section and, as such, occupied a very prominent place in the paper. Moreover, the story began on the front page, and both pages contained large headlines, in bold type, clearly calculated to draw attention to the story. (Petitioners' Appendix includes only the front page headline and their re-print of the article disguises the flavor of the original, which we believe this Court should sample. We have enclosed a *complete* copy of the original article in the envelope attached to the inside back cover of this Brief.)

meeting; and the tape clearly showed that McCall did not guarantee Frazier that she would not go to jail. Moreover, the front page headline concerned a "guarantee of freedom," when the reporters themselves admitted they knew the only guarantee was for a refund of part of the fee.

The article implied that at the January meeting McCall had set a fee of $10,000 to represent Frazier, despite the fact that the tape clearly showed that McCall was completely taken aback at Frazier's first mention of a $10,000 fee.

The article did not mention that McCall's guarantee of a refund was induced by Frazier's claim of innocence coupled with repeated pleas for help and demands for a guarantee, for fear of someone being "assassinated" by the "crazy gamblers."

The article discussed McCall's desire for secrecy, but did not disclose his statement, which is contained in the Petitioners' transcript, that Frazier could "tell Bogart or somebody," and that he would accept payment "by cash, check. Anyway. (sic)"

The article reported the fishing trip and McCall's saying he would tell the prosecutor and Judge about his large fee, so as to suggest that these matters were related to Frazier not having to go to jail. Nowhere does it mention the fact that what McCall was talking about was trying to get a continuance so that he could prepare the case.

The article seemed to corroborate Frazier's version of the January meeting which was in part the basis of

the fix allegation which the reporters originally suggested to Frazier.

The story contained Frazier's claim that McCall had said at the first meeting that he would guarantee her that for $10,000 she would walk into the courtroom and walk back out. However, McCall's ignorance of such a statement was not reported, nor was his shock at Frazier's mention of the $10,000 fee, nor the fact that Frazier, at the second meeting, made a guarantee a condition of McCall's employment. Hence, the reader is left with the feeling that at the first meeting McCall had indeed said what Frazier attributed to him.

The use of the "guarantee of freedom" headline and the omission of McCall's express statement that he was not guaranteeing Frazier that she wouldn't go to jail further reinforces the reader's view that McCall had indeed made Frazier a guarantee, and thus that—at the first meeting—he probably also had said or implied that he would fix the case.

Statement of Proceedings Below

Beginning at p. 8, the Petition purports to describe the proceedings below. In so doing, the Petitioners treat this Court to a fairyland version of what McCall supposedly "claimed," "agreed to," "asserted," "conceded," "contended," "altered," "argued," "limited his arguments to" and "did not allege."

Space does not permit a full-scale attack on Petitioners' characterization of McCall's claims below. Therefore, we have attached in Appendix C a copy of Count 3 of the Amended Complaint. If the Court will

simply read this, in conjunction with the facts presented by both sides, it will become apparent that McCall's claim is that the entire article as a whole was libelous and portrayed everything that transpired in a false light and that, in addition to implying bribery and illegal conduct, the article contained the express repetition of Frazier's allegation that McCall had offered to "fix" her case.

ARGUMENT

Summary of Argument

Respondent's arguments may be summarily expressed as follows: the decision of the Kentucky Supreme Court is both legally sound and founded upon a correct application of the Constitutional principles laid down by this Court in defamation cases, and there is therefore no need for this Court to review that decision.

The Kentucky Supreme Court's adoption of the tort invasion of privacy by false light portrayal, as relates to this case, is clearly within the bounds of permissible state court action as defined in *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967) and *Cantrell* v. *Forest City Pub. Co.,* 419 U. S. 245 (1974), and thus presents no reviewable issue to this Court.

Petitioners' claims that this Court should adopt the doctrine of neutral reportage, that the application of the simple negligence standard in this case was improper, and that the Plaintiff should have the burden of proving that a defamation is false, at least as these claims relate to this case, have all been met—either

directly or indirectly—by this Court in prior cases, hereinafter discussed, and there is no need for the Court to grant Certiorari to re-hear the claims as presented by the Petitioners in this case.

I. The Kentucky Supreme Court's Rejection of the Defense of Neutral Reportage Was Proper.

Before responding to the merits of the Petitioners' claim that there exists a Constitutional defense of neutral reportage, we point out that there are four erroneous assumptions which underlie their argument. The first is that the report was "neutral"; the second is that the story accurately reported the falsity of Frazier's allegation; the third is that the allegation was "newsworthy"; and the fourth is that the mere repetition of Frazier's defamatory statement was the only basis for the libel claim.

Points one, two and four have been dealt with previously: clearly there was not a neutral report of Frazier's statement; clearly there was not an unambiguous statement that the paper had found Frazier's claim to be false; and clearly the mere repetition of Frazier's fix allegation was not the sole basis for the libel claim.

Frazier's allegation was not newsworthy. Note that not even the Petitioners argue that Frazier's allegations about the *first* meeting had news value. The only justification they provide for publishing the report is the claim that it was necessary to do so in order to explain to the readers *The Times'* questionable conduct

in planning a surreptitious entry into, and a secret recording in, a lawyer's office.

The Merits of Petitioners' Argument. Putting aside the Petitioners' erroneous assumptions and responding to the merits of their contention arguendo, it is our rejoinder that there is no Constitutional privilege to report false, defamatory allegations which are made by one private individual and which concern another private individual.

The Petition finds support for its stance in these cases: *Edwards* v. *National Audubon Society, Inc.*, 556 F. 2d 113 (2d Cir. 1977), cert. den., 434 U. S. 1002 1978); *Greenbelt Coop. Pub. Asso.* v. *Bressler,* 398 U. S. 6 (1970); and *Time, Inc.* v. *Pape,* 401 U. S. 279 (1971). However, these cases do not support the Petitioners' argument. (Nor do the legal treatises cited by Petitioners[4])

Edwards v. *National Audubon Society, Inc.* held that there was a constitutional privilege of neutral reportage where a prominent person or organization makes a defamatory allegation regarding a public figure. However, in that case the requisite malice, as required by *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), did not exist, and thus, even the language on neutral reportage which was used in *Edwards* was, arguably, dicta.

---

[4]*None* of these treatises has even proposed a constitutional privilege for the report of a false defamation made by one private individual about another.

The Petition relies on *Greenbelt Coop. Pub. Asso.* v. *Bressler* and *Time, Inc.* v. *Pape* for the proposition that there is a Constitutional privilege to republish assertions of fact that are known to be false where the assertion is first uttered in a public or governmental forum, or by a candidate for public office.

Greenbelt Coop. Pub. Asso. v. *Bressler* did not hold, or imply, that The Greenbelt News could have avoided liability had the speakers at the city council meeting meant to charge the plaintiff the crime of blackmail and had the paper printed the charge with knowledge of its falsity.[5]

In *Time, Inc.* v. *Pape* there was no suggestion that the media knew that the "finding" or "allegation" contained in the Commission's report was untrue. Nor does anything in the case suggest that the defendant would have been immune from suit had it shown that it knew that the defamatory material was untrue. The sole issue in the case was whether, notwithstanding the *defendants' ignorance of the falsity of the defamation,* it had falsely reported the actual contents of the Commission's report.

If there were ever any confusion over the existence of a Constitutional privilege as to reports of legislative or judicial proceedings, it was dispelled by *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976) where, at p. 456, it was said that no such privilege "is to be found in the

[5]The fact that the Court was invited to deliver such a holding, but declined the invitation, was noted in the concurring opinion of Justice White. 398 U. S. 6, at 23.

Constitution." In view of this Court's holding in *Firestone,* no consideration should now be given to the Petitioners' contention that a Constitutional privilege attaches to their repetition of Frazier's supposed factual allegation of an "offer to 'fix'."

It is irrelevant that a reader might understand that the newspaper was not necessarily adopting Frazier's charge. In each of the following cases the readers, or listeners, knew that the republisher was not necessarily adopting the republished libel, but was merely repeating or reporting what someone else said, and such was irrelevant to the issue of liability: the political advertisement in *New York Times Co.* v. *Sullivan, supra;* the verbatim transcript in *St. Amant* v. *Thompson,* 380 U. S. 727 (1968); the Court records in *Time, Inc.* v. *Firestone, supra;* the report of the Civil Rights Commission in *Time, Inc.* v. *Pape, supra.*

The Petition states, incorrectly, that, "[i]n this case, the falsity of the republished statement is the very fact that was truthfully reported by the media defendant." Therefore, the Petitioners argue, since the article shows that they knew of the falsity of the defamation, they have a constitutional privilege to report it. That argument is a Catch-22: if a plaintiff can't prove actual malice or fault, he loses; if he can show actual malice or fault based on evidence which appears on the face of the publication, he still loses!

Suppose that, in *St. Amant* v. *Thompson, supra,* after having read the verbatim quote of Albin's defamation, St. Amant had said, "Now I personally have *serious doubts* about the truth of Mr. Albin's charges,

but I'm repeating them because they're interesting." Under those circumstances, would this Court have held that Thompson would still lose? Of course not!

This Court has never suggested—even as to a public figure—that once actual malice is shown, either by the defendant's own admission on discovery, or by circumstantial evidence (even where such evidence is found in the article itself), that the Constitution requires the plaintiff must also prove it is journalistic malpractice to reprint a factual defamation with knowledge of its falsity or with serious doubts as to its truthfulness.

II. There Is No Constitutional Basis for Questioning the Kentucky Supreme Court's Adoption of the Tort of Invasion of Privacy by False Light Portrayal.

This Court has twice decided that there is no Constitutional barrier to a state's recognition of the tort of invasion of privacy by false light portrayal. *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967); *Cantrell* v. *Forest City Pub. Co.,* 419 U. S. 245 (1974).

The Petition's primary response to the Kentucky Court's recognition of this tort is not a Constitutional argument, but rather a personal reaction to whether the policy decision underlying the recognition of the tort is a wise or necessary one.

On a Constitutional level, we point out that, in terms of the Kentucky rule, thus far the tort has only been held applicable in this particular case, wherein the substance of the false portrayal itself made obvious the substantial damage to the Plaintiff's reputation,

and wherein the Court held that for the Plaintiff to prevail on this ground he must show actual malice.

As to the effect of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974) on the tort of false light portrayal, it is respectfully submitted that what this Court meant by the language quoted at page 26 of the Petition was as follows: (a) with respect to claims by private individuals for defamatory falsehoods wherein the danger to their reputation is apparent, the states could impose liability however they wished, so long as there was some type of fault requirement; (b) only if the falsehood was not defamatory, or if the potential damage of a defamatory statement was not apparent, would a more stringent test, such as actual malice, be required.

There is no need for this Court to decide, in this case, whether the Kentucky Supreme Court would be acting contrary to the First Amendment if it applied the tort of invasion of privacy by false light portrayal in a case with different facts.

The Petitioners contend that "newsworthiness" should be a defense to publicly portraying an individual in a false light, even if actual malice is present. If ever there could be any merit to such an assertion, which is doubtful, it certainly ought not be considered on the facts of this case. Here, the newspaper, by rehearsing Frazier and inducing her to go to McCall's office, was manufacturing news, not merely reporting it.

Furthermore, there is in this case another constitutional interest competing with the claimed First Amendment interest: i.e., the right to counsel. Even

where the false portrayal only humiliates but does not defame there would be a "chilling effect" on the effective representation of people by lawyers who—without civil remedy—must be ever fearful that every person who walks through their door may be an agent for the media who will furtively tape their conversation and then report it out of context and falsely portray it for mass public consumption.

III. McCall Was Not a "Limited Public Figure" and There Is No Constitutional Impediment to Applying the Simple Negligence Standard in This Case.

Petitioners argue that McCall was a "limited public figure" and, therefore, that the simple negligence standard adopted by the Kentucky Supreme Court conflicts with the previous decisions of this Court.

The concept of a "limited public" figure has its origins in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). Having decided that Mr. Gertz was not a public figure for all purposes, this Court developed a test for determining when one is a public figure for limited purposes.

Using *Gertz* as a guideline, it is clear McCall was not a "limited public figure." He sought no publicity; nor, indeed, did he take any affirmative steps to bring himself into the public eye for any reason. There was no controversy, public or private, which gave rise to the defamation.

Petitioners, realizing that McCall could not be classified as a public figure under the *Gertz* standards, argue that this Court has created *three* statuses for plaintiffs: public figure, limited public figure, and

private figure; while it has limited its choice of burdens of proof to two: the *Sullivan* Standard of actual malice and simple negligence. This is, of course, nonsense.

The Court has created two, not three, categories of Plaintiffs: public figure and private figure. The public figure test is met if: (1) one is a pervasive public figure; or (2) one has injected himself into the vortex of a particular controversy or issue wherein he seeks to influence public opinion. This latter has become known as a "limited public figure."

Neither has this Court limited its choice of burdens of proof. It has held that with respect to public figures, limited or pervasive, the actual malice test must be met. As to non-public figures, however, the states are left free to impose their own standards, so long as the adopted standard is in some way fashioned on fault.

Apparently, the Petitioners would like the mere fact that they write a story about someone to elevate that person to the status of a "limited public figure", thereby requiring him to show actual malice or gross negligence. In view of the holding in *Gertz,* however, this Court should not further consider the Petitioners' claims in this regard.

IV. The Question of Which Party Has the Burden of Proof as to the Truth or Falsity of the Defamatory Publication Has Already Been Decided by This Court.

As the Petitioners state, the Kentucky Supreme Court established a negligence test which relates to the negligence of the publisher in failing to exercise reason-

able care to investigate the truth of the defamatory material. If by the exercise of such care the publisher has a good faith belief in the truth of the material, then he is not at fault. On the other hand, if he does not make a reasonable investigation, or having made one, he does not in good faith believe the defamation is true and he publishes it anyway, then he is liable.

A plaintiff in Kentucky need not prove that the defamation is false. Petitioners, however, would like the plaintiff to have this added burden.

The media would like to be able to print whatever it chooses about someone and then say to its victim, "you prove it's not so"—in other words, to make the victims of the media's defamations guilty as charged until proven otherwise.

Respondent submits that the Petitioners' contention should be controlled by *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976). In that case, the Court consciously considered the fact that the record failed to show some degree of fault, and reversed the Florida Supreme Court for that reason. In the course of its opinion, at page 459, this Court noted that Time, Inc. chose to report one of several possible interpretations of the Firestone divorce decree, and that:

> Having chosen to follow this tack, Petitioner [Time, Inc.] must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, *but that the item was factually correct.* (emphasis added)

Because the above quotation appeared in the same paragraph as a discussion of the fact that the fault requirements of *Gertz* were not met, we conclude that whatever type of fault this Court had in mind to satisfy *Gertz,* it did not mean that, as part of showing that fault, the plaintiff would have the added burden of proving the falsity of the defamation.

In this case, there was evidence in the news article itself that the Petitioners did not have a good faith belief in the truth of Frazier's allegations. We believe that, based solely on what was contained in the article itself, and even more so when coupled with the judicial admissions contained in the Petition, *Gertz* type fault is met here as a matter of law.

If the Petitioners seriously want to rely on truth as a *defense* to their libel, then, under the rationale of *Time, Inc.* v. *Firestone, supra,* we claim that since they chose to publish Frazier's expressions of opinion as a factual allegation that "McCall offered to fix her case for $10,000, they must establish not merely that their report was an accurate rendition of her charges, but also *that their report was factually correct,* i.e., that McCall had, in fact, offered to "fix" her case.

The issue of which party has the burden of proof on this issue was clearly settled by *Time, Inc.* v. *Firestone.* It should not now be further addressed by this Court.

CONCLUSION

For the reasons stated, the Respondent, John Tim McCall, respectfully prays that the Petition be denied.

Respectfully submitted,

EDWARD M. POST
812 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-5760
Counsel of Record for Respondent

Of Counsel:

JAMES E. MORREAU, JR.
TAUSTINE, POST, BERMAN, FINEMAN & KOHN

Appendix

APPENDIX A

Excerpt From Plaintiff's Brief to the Court of Appeals, Commonwealth of Kentucky

(Sections 9 and 10, from pages 8-9 of the Original Brief)

9. *Frazier's second visit to McCall on March 10.*

Frazier and the reporter taped what was going on in his outer office between his clients and associates (Frazier Dep. 78); then Frazier went into his inner office and as shown at T.R. 77, announced she could get "the $10,000".

As previously explained at p. 4, initially McCall was shocked and surprised about even the idea of a $10,000.00 fee; however by T.R. 79 he had certainly adjusted to the possibility of earning such a fee. As he tried to tell Frazier, it was more money than he had ever made in any case he had handled (T.R. 89).

In response to her first mention of a payoff, he told her that there would be no pay-off, but that he would figure out a way to get her out of her difficulty, even if it was necessary to import a lawyer. He said, "we'll do something" (T.R. 79). To the statement, "we'll do something" he added "I *probably* could. *I don't know.*" The foregoing was omitted from the Defendants' transcript, but it is heard on the tape all the same. (T.R. 159 & 190).

Frazier then indicated that she had to have a guarantee because she planned to get money from some crazy gamblers in exchange for her performance of services in Las Vegas. (T.R. 80). Although not expressed, it was implied that the gamblers would not be very happy with Fraizer if they provided $10,000.00 and Frazier was unable to deliver her services. (T.R. 88) It was expressly understood that the crazy gamblers killed people when they became unhappy. (T.R. 94). She told McCall that she wanted a guarantee and that if "you guarantee me", she would give him $10,000.00. (T.R. 80).

While asking Frazier about the facts of the case, she again told him she wanted to give him the money to fix the case. He told her there would be no fix, and said "I think you've got a tape recorder in your purse there" (T.R. 94). "No", she replied.

After listening to her proclaim her innocence, he told her that if she didn't go to jail or the penitentiary, his fee would be $10,000.00; but *if she did,* he would return $9,000. That is the arrangement that he called a guarantee—that nothing would happen to Frazier (T.R. 88), i.e., even if she went to jail, the crazy gamblers would not become unhappy because they would get their money back. But he expressly told her he *was not* guaranteeing her freedom!

At T.R. 95, the Defendants' transcript shows McCall saying, "I guarantee you . . . I am going to get you out of this", and then going on to say that if he didn't he would return the money. However, a correct transcript of the tape would have shown that McCall actually said:

> I guarantee you *not* that I'm going to get you out of it—*not* going to get you out of this. But that if you pay me the $10,000.00 and I don't get you out of it, I'm going to give you the money back. (Emphasis supplied.) (T.R 159 & 190)

10. *McCall's Transgressions at second meeting.*

For the purpose of this appeal *only,* we will assume: that McCall's promise of a refund (so the crazy people would not become unhappy) was tantamount to an unethical contingent fee arrangement; that he also acted unethically when he mentioned a fishing trip with the judge even if, as we contend, the context indicated he was only suggesting that such a relationship would enable him to get a continuance because he had just entered the case; and that it was also improper to suggest that sympathy from the prosecutor for him might affect the case.

We will not recite the factors in mitigation of these transgressions. If the Court is interested, it can read our views at T.R. 160-162 on that subject.

We believe these transgressions are irrelevant to this case. Certainly none of them justified the Defendants' reporting a false allegation that McCall had offered to fix her case.

Although McCall may not have been entitled to keep his transgressions private, neither would they excuse tortious conduct, if any, involved in entering his office to provoke and record these transgressions—particularly under McCall's version of Frazier's first visit. (E.g., if the Defendants had burglarized McCall's office and found documentary evidence that McCall fixed traffic tickets, he would have no right to keep his guilt "private"; but the Defendants would still be civilly liable for trespass.)

APPENDIX B

Excerpt From Plaintiff's Brief to the Supreme Court of Kentucky

(Sections 9 and 10, from pages 10-13 of the Original Brief)

9. *Frazier's Second Visit to McCall—March 10, 1976.*

Frazier and the reporter accompanying her taped what was going on in McCall's outer office between his clients and associates (Frazier Dep. 78). Then Frazier went into his inner office, and, as shown at T.R. 77, announced she could "get the $10,000."

As previously explained above, McCall was shocked and surprised just at the idea of a $10,000 fee. [However, he later had certainly adjusted to the possibility of earning such a fee. (T.R. 79.)] As he tried to tell Frazier, that was more money than he had ever made in any case he had handled. (T.R. 89.)

In response to Frazier's first mention of a payoff, McCall told her that there would be no pay-off, but that he would figure out a way to get her out of her difficulty, even if it were necessary to import a lawyer. He said, "We'll do something (T.R. 79.) To the statement, "we'll do something" he added, "I *probably* could [get you out of trouble]. *I don't know.*" This was omitted from the Appellees' transcript, but it is audible on the tape all the same. (T.R. 159, 190.)

Frazier then indicated that she had to have a *guarantee* because she planned to get the money from some crazy gamblers in exchange for her performance of services in Las Vegas. (T.R. 80.) Although not expressed, it was implied that the gamblers would not be very happy with Frazier if they provided the $10,000 and then she was unable to deliver her services. (T.R. 88.) It was expressly understood that the crazy gamblers killed people when they

became unhappy with them. (T.R. 94.) Frazier told McCall that she wanted a guarantee and that if "you guarantee me," she would give him $10,000. (T.R. 80.)

While McCall was asking Frazier about the facts of the case, she again told him she wanted to give him money to fix the case. He told her there would be no fix and said, "I think you've got a tape recorder in your purse there." (T.R. 94.) "No." she replied.

After listening to her proclaim her innocence, he told her that if she didn't go to jail or the penitentiary, his fee would be $10,000; but that *if she did,* he would return $9,000. That is the arrangement that he called a guarantee—that nothing would happen to Frazier. (T.R. 88.) That is, even if she went to jail, the crazy gamblers would not become unhappy with her because they would get their money back. But he expressly told her he was *not* guaranteeing her freedom!

At T.R. 95, the Appellees' transcript has McCall saying, "I guarantee you . . . I am going to get you out of this," and then going on to say that if he didn't, he would return the money. However, a correct transcript of the the tape shows that McCall actually said:

> I guarantee you *not* that I'm going to get you out of it—*not* going to get you out of this. But that if you pay me the $10,000 and I don't get you out of it, I'm going to give you the money back. (Emphasis supplied) (T.R. 159, 190.)

10. *McCall's Transgressions at the Second Meeting.*

For the purpose of this appeal *only,* we will assume: (1) that McCall's promise of a refund (so the crazy gamblers would not become unhappy) was tantamount to an unethical contingent fee arrangement; (2) that he also acted unethically when he mentioned a fishing trip with the

judge even if, as we contend, the context indicated he was only suggesting that such a relationship would enable him to get a continuance because he had just entered the case; and (3) that it was improper to suggest that sympathy towards him on the part of the prosecutor might affect the case.

We believe these transgressions are irrelevant to this case, however. Certainly, none of them justifies the actions of the Appellees in reporting a false allegation that McCall had offered to fix Frazier's case.

Although McCall may not be entitled to keep these transgressions private, neither does their existence excuse the tortious conduct, if any, involved in entering his office to provoke and record them. This is particularly true under McCall's version of Frazier's first visit. (If the reporters had burglarized McCall's office and found documentary evidence that McCall fixed traffic tickets, he would have no right to keep his guilt "private"; but the Appellees would still be civilly liable for trespass. Similarly, if they reported the false allegation of another that McCall was a rapist, they would still be liable for defamation.)

APPENDIX C

Count Three of Plaintiff's Amended Complaint

(Paragraphs 14-20a, from pages 4-6 of Original Awarded Complaint)

COUNT 3—LIBEL OR INVASION OF PRIVACY BY PORTRAYAL IN FALSE LIGHT AND (OR IN THE ALTERNATIVE) ALLEGATIONS WHICH CONCERN THE PLAINTIFF'S DAMAGES AND THE AGGRAVATED NATURE OF THE DEFENDANTS' CONDUCT

14. During the course of his conversion with Kristie Frazier, the plaintiff said certain things or used certain words and phrases which, had they been spoken to one occupying the relationship she pretended to occupy, would have been either violative of the letter or spirit of the Attorneys' Code of Professional Responsibility; or, which regardless of whether the statements, words and phrases should be so characterized, were things he should not have said and were of a nature which, if publicized fairly, would have caused some damage to his reputation and some personal embarrassment.

15. However, the defendants' initial news story, and/or subsequent follow-up stories, portrayed what actually transpired in a false light. This initial story and/or the follow-up stories were so written as to cause an average reader to believe the following things which were untrue:

(a) that the plaintiff was a dishonest person and/or had actually been engaged, or was ready and willing, to engage, in a crime, i.e. bribery, and/or;

(b) the plaintiff had committed such serious and flagrant violations of the ethics of his profession so that he should be considered: dishonest; a totally dis-

reputable person; and one unworthy of trust or the right to practice his profession.

16. The result of the defendants so writing their stories was to make it appear to the average reader that the plaintiff was guilty of conduct of a far more serious nature than he was and/or would be considered by the average reader had the defendants' story or stories been written in a fair and reasonable manner.

17. The defendants accomplished what has been described in the preceding two paragraphs by a number of different means, some of which are as follows:

(a) failing to report some of the things which were said during the course of the plaintiff's conversation with Kristie Frazier, which things would have mitigated the effect of the plaintiff's actual words on the average reader;

(b) the placement and length of the news story;

(c) unfair and incorrect statements about what actually transpired;

(d) the defendants' use of captions and headlines for its story.

18. The defendants knew:

(a) that the public would take its initial story and/or follow-up stories in the light herein alleged in paragraphs 15 and 16; or they were recklessly indifferent to how what they wrote would be viewed by the general public; and

(b) that the portrayal of the plaintiff in the light alleged in paragraphs 15 and 16 was false or in the alternative the defendants acted with a reckless disregard to whether it was true or false.

19. The defendants' distorted reporting of the plaintiff's conversation with Kristie Frazier was wrongful and caused the plaintiff mental suffering and damage to his reputation far beyond that which would have been caused by fair and reasonable news stories, even were it assumed that the defendants had the right to publish such stories obtained by its invasion of the plaintiff's right of privacy as alleged in Counts 1 and 2 hereof.

20. The defendants' initial story appeared in the March 17th edition of "The Louisville Times." Some of the "follow-up" stories appeared in the newspapers of the defendants as follows:

Courier-Journal	3/19/76
The Louisville Times	7/29/76
The Louisville Times	6/15/76
The Louisville Times	8/19/76
The Louisville Times	8/12/76
Courier-Journal	8/31/76
Courier-Journal	7/23/76
Courier-Journal	8/19/76

20. (a) Without limiting the generality of numerical paragraphs 11 through 20 hereof, the plaintiff states specifically that the defendants in their initial news story of March 17, 1976, and in the follow-up stories thereafter published material about the plaintiff which directly charged that the plaintiff had "offered to fix" a case and which, by imputation, innuendo, and implication, indirectly charged the same thing. The said charges were false and were printed and distributed with knowledge of their falsity or with a reckless indifference to whether they were false or not.

Lawyer's 'guarantee' to keep woman free for $10,000 ethical?

By RICHARD KRANTZ and TOM VAN HOWE

© 1976, The Louisville Times

Louisville attorney Tim McCall, in possible violation of his profession's ethics, told a defendant in a criminal case here that for $10,000 he would either keep her out of jail or refund most of her money.

"(If) you don't go to jail or the penitentiary, then I'll charge you 10 grand. If you do, then . . . I'll charge you $1,000 for my trouble," McCall said last week to Kristie Frazier, 27, who is charged with trafficking in narcotics.

". . . In other words," McCall said, "I'm guaranteeing you for nine grand more that you won't—that nothing will happen to you."

McCall, 34, a cochairman of the Louisville Bar Association's Criminal Practices Committee, denied making any unethical guarantee to Miss Frazier, or doing anything else unethical involving her case.

According to a tape recording of the conversation between McCall and Miss Frazier, McCall also told the woman that if she raised $10,000 he would tell a prosecutor and a judge "that I'm making a substantial fee, and maybe the prosecutor will be sympathetic to me, and he will, too . . . they'll help me, and that'll help you."

When Miss Frazier expressed concern about her court appearance Monday and the possibility of her going to jail this week, McCall told her, "Hey, don't worry about it—I'm going fishing with (Criminal Court Judge John P.) Hayes Friday. All weekend."

Any such statements made by a lawyer to a prospective client may violate two rules of the Code of Professional Responsibility of the American Bar Association (ABA), according to ABA spokesmen.

One rule prohibits lawyers, under penalty of bar association discipline, from agreeing upon a 'c'ontingency fee" in a criminal case.

A contingency fee is, in effect, when an attorney sets a certain fee if the case is won, and a lesser fee if the case is lost.

The other prohibits lawyers from implying that they are able to "influence improperly" any tribunal or public official.

The conversation between McCall and Miss Frazier occurred last Wednesday in McCall's office. At the request of the Louisville Times, Miss Frazier recorded the conversation on a tape recorder in her purse.

During the conversation, Miss Frazier stated at least twice that McCall would be using the $10,000 she would raise to "fix" the case. After each such statement McCall stated that no "fix" or other illegal action, such as a payoff, would be involved. Once McCall said, "It's not a fix. Don't talk like that."

At another point, he said, "The $10,000 would be my legal fee and I'll figure out some way to get you out of this if I have to import the damnedest lawyer in town to do something.

In a telephone interview Monday, Mc-

See WAS LAWYER'S Back page, col. 2, this section

the bac

Was lawyer's freed

Staff Photo by Carl Best

KRISTIE FRAZIER
Taped conversation with lawyer.

Continued From Page One

Call said: "I don't think that any statement I made to Miss Frazier violates any code of ethics for attorneys or judges. I don't believe that I was unethical with her or agreed to do anything illegal."

McCall said he made no absolute guarantees of the results of the case to Miss Frazier.

"A guarantee," he said, "is when you tell somebody it is going to be that way —and no other alternative. I never told her that."

'Not a contingent fee'

McCall also said that while a "purely contingent fee" is unethical in a criminal case, his proposed arrangement with Miss Frazier was "not a contingent fee."

He said a contingent fee can be based on the outcome of a case or on the amount of work involved. He refused to discuss, however, whether his statements fell into either category.

McCall said the only reason he even agreed to talk to Miss Frazier about her case was because "two good clients of mine called me and asked me to help this girl out."

McCall added that his statement to Miss Frazier—that she shouldn't worry, because he was going fishing with Judge Hayes—meant "only that I was going fishing with Judge Hayes—and I didn."

McCall said he never mentioned Miss Frazier's name on the fishing trip and added that he would not discuss a case out of court with a judge unless a prosecutor was present.

Judge Hayes, asked yesterday about the weekend fishing trip with McCall, said there was no conversation between himself and the attorney about Miss Frazier's case.

McCall said other attorneys, including a prosecutor, had been invited to accompany McCall and Hayes on the trip. But, McCall said, only a policeman accompanied them.

3 authorities consulted

The Times consulted two national authorities and one local authority on ethics in the legal profession.

Two of them said they would comment only if their names were not used. Both of these persons were associated with legal ethics committees on a national or local level.

All three agreed that there seemed to be a contingency fee involved in the case described to them by The Times. They said this was clearly unethical.

One man queried was Philadelphia attorney Lewis Van Dusen, the national chairman of the ABA's Ethics Committee.

"That's easy," Van Dusen said. "Contingent fees are not permissible in a criminal case." They are, however, permissible and common practice in civil cases, he said.

Two of the attorneys were asked whether it was proper for a lawyer to say not to worry because he is going fishing with the judge, and to say that he would try to seek sympathy by telling of his high fee.

One of them said that this seemed to be suggesting to a client that the lawyer could use "improper influence." He said he would have to know the full facts to be certain. The other said he could not comment without knowing the full facts.

All three experts said that they would have to know the precise facts of the case in order to comment further.

Specializes in criminal law

McCall, of 3400 Winchester Drive, specializes in the practice of criminal law. Early in his career, he served as both an assistant city attorney and as an assistant commonwealth's attorney. He is a 1966 graduate of the University of Louisville School of Law.

McCall on Monday asked Commonwealth's Atty. David Armstrong to bring the entire matter—including the actions of The Times in obtaining the tape—

Armstrong plans action

Armstrong said yesterday that he intends to bring it before the grand jury and that he wants to determine if in fact, any unethical practices on the part of an attorney took place.

He also said he wants to determine if the press acted unethically or illegally by promoting or encouraging a bribe. He said if the newspaper or its representatives are guilty, he intends to prosecute.

He said he will prepare subpoenas to require the testimony before the grand jury of Times reporters who wrote the article. He said he will also seek to obtain the tape recording of the conversation between McCall and Miss Frazier.

The Times requested that Miss Frazier tape-record the conversation because the newspaper was attempting to investigate her allegations that McCall had offered to "fix" her case for $10,000. However, The Times found no indication of any "fix."

The Times first became interested in the case while interviewing Miss Frazier on another matter on March 3. She told reporters she could avoid going to jail if she could raise $10,000 to give to McCall.

She said that she went to McCall last January after some friends told her that he might be able to keep her out of jail.

At the January meeting in McCall's office, according to a sworn affidavit Miss Frazier gave to The Times, McCall told her that he would represent her, with no guarantees, for $1,500.

But for $10,000, Miss Frazier said in her affidavit, he would guarantee that she would "walk in the courtroom and turn around and walk back out."

Backed by witness

A witness to that meeting, who asked not be named, has also provided The Times with an affidavit supporting Miss Frazier's statements. However, McCall disputes Miss Frazier's account of that meeting.

Both Miss Frazier and the witness said they believed, based on the January conversation, that McCall intended to "fix" the case for $10,000.

After hearing their statements and receiving their signed affidavits, The Times decided to pursue the investigation.

The investigation was designed to determine if Miss Frazier's case was being handled illegally, and to see if the attorney had, in fact, made improper offers to a prospective client.

The Times asked Miss Frazier if she would agree to go back to McCall's office, with a tape recorder provided by The Times in her purse, to see if McCall would repeat what he had allegedly told her in January.

The Times told Miss Frazier that if

dom 'guarantee' ethical?

TIM McCALL

Says actions weren't unethical

1968 Photo

the attorney indicated to her that he was actually going to "fix" the case, the newspaper would consider providing the $10,000 in an effort to detect any possible misbandling of the case.

The Times told Miss Frazier that the decision to provide the money would be based on what McCall said on the tape, and if there was a definite indication that a fix or bribe might be involved.

She was not instructed by The Times to mention a "fix" or a bribe, but just to say what she ordinarily might say in such a conversation.

She was told only one question to ask. That question was, "Can't this case be handled in the regular way for $1,500, without a payoff, or does it have to take $10,000 to keep me out of jail?"

Times reporters felt that such a question might elicit an answer from McCall which would indicate whether the case was to be handled in a normal, legal fashion, or possibly in an illegal way.

The Times also told Miss Frazier that if bribery of a court official was indicated, this would be illegal for her or The Times to participate in.

Following the second meeting between Miss Frazier and McCall, last Wednesday, the tape recording of their conversation was evaluated by Times editors, reporters and the newspaper's attorneys. The tape did not indicate payoffs that McCall contemplated to officials to dispose of the case, and the newspaper decided not to provide the money.

Indicted last April

Miss Frazier was indicted by a Jefferson County grand jury on April 30, 1973, on a charge of selling a quantity of cocaine to an undercover narcotics agent of the Jefferson County Police Department.

She has steadily maintained she is innocent of the charge, which is pending before Criminal Court Judge George Kunzman.

After her indictment, Miss Frazier hired attorney Richard Nash Sr. to represent her.

Nash said he advised Miss Frazier to plead guilty to the charge and accept the commonwealth's offer of one year's confinement in the Kentucky Correctional Institute for Women at Pewee Valley.

Nash told The Times he feared that if the case went to trial a jury would convict her. Miss Fraizer could then be sentenced to five to 10 years in a state prison.

Miss Frazier was convicted almost five years ago of possession of marijuana, and Judge Hayes sentenced her to six months in jail. The sentence was probated for five years, however, and she did not spend any time in jail.

Following her latest arrest on the charge of trafficking in narcotics, Judge Hayes filed his own motion to revoke her probation.

Nash said he felt her changes for freedom were so poor that he told her, before she appeared in court Monday, to "come prepared to go to jail."

Nash said he thought her best bet would be to accept a year at the Pewee Valley facility by pleading guilty to the present charge, rather than face six months of more disagreeable confinement in the county jail by having her probation revoked by Hayes on the 1971 conviction.

Miss Frazier, knowing the high likelihood of her going to jail, turned to McCall last January, seeking a way to keep her freedom.

McCall disagrees with Miss Frazier's account of their first discussion. McCall told The Times that he flatly refused to represent her at that time and "sent her back to her attorney (Nash)."

However, the tape recording made at last week's meeting indicates that McCall did not flatly refuse earlier to represent her. There are two references on the tape to their first meeting.

The first refers to the fee McCall quoted her.

"Yeah, now look," Miss Frazier said. "Okay, for 15—you told me you would represent me for $1,500. . . ."

"Fifteen hundred dollars," McCall said interrupting, "no guarantees, no nothing."

"No guarantees," Miss Frazier responded, "no nothing. Right."

The second reference to their original conversation came when McCall asked Miss Frazier who arrested her.

After naming the officer, she added, "You said you were going to talk to him."

"I didn't talk to him," McCall responded, "because you, I, never came back to talk to you about it."

During their taped conversation last Wednesday, McCall said he would represent Miss Frazier under "three conditions."

"They are," McCall said, "Number one that (attorney) Nash has no objections to it . . .

"Number two," he continued, "that it's between you and myself, and nobody else discusses the fee . . ."

"Number three," McCall said, "is you have to take my word or you can trust (one of his clients) or somebody that knows me that if I get you out of it. By getting you out of it I mean you don't go to the penitentiary. It may be a probated sentence, it may be you have to leave the jurisdiction. If you don't go to jail or the penitentiary, then I'll charge you 10 grand. If you do, then I won't charge you—I'll charge you $1,000 for my trouble. But, in other words, I'm guaranteeing you for nine grand more that you won't, that nothing will happen to you."

"So, if I blow," McCall added, "I have to give you your money back. . . . I'll say that you're going to be out of it. Something could possibly go wrong, and if it did, I'd give you your money back. It's that simple."

Later, McCall impressed upon Miss Frazier that she should not tell Nash about their arrangement.

". . . I just don't want anybody to know about it. Now I'm serious about that. I don't want Nash; I don't want any policemen, any judges—I don't want nobody to know about it but me. It's between you and me."

After McCall told Miss Frazier that he was simply doing her a favor, that he didn't need the extra business, she mentioned that she was to appear in court the following Monday (this week).

"I'm a nervous wreck," she said. "They're going to put me in jail, and it's Monday. See? It's Monday. Monday."

"Monday's the 15th?" McCall asked. "Do you mean it's scheduled for trial Monday?"

"That's what I mean," Miss Frazier said. "You got to do something. If I could get you the money Friday. . . ."

"Hey," McCall interrupted, "don't worry about it—I'm going fishing with Hayes Friday. All weekend."

Moments later, McCall instructed Miss Frazier not to say anything about his fishing trip with Hayes.

". . . Going around telling people he and I are friends (could) put him on the spot," McCall said. "He's a very honest judge. I'm going to tell you, believe it or not, the only way I could straighten this out is through legal recourse and the fact that I can tell him that I'm making a substantial fee, and maybe the prosecutor will be sympathetic to me, and he will, too . . . they'll help me, and that'll help you."

"Okay," Miss Frazier said, "consider it done."

"I'll consider it done," McCall said, "when you come in here."

"With the $10,000," Miss Frazier said.

"Yeah," McCall replied.

Miss Frazier did not produce the $10,000, however, and Nash remained her attorney. Monday, when she appeared in court, she was offered the agreed upon deal from the commonwealth—one year in prison in return for a plea of guilty.

Miss Frazier reluctantly signed the necessary court papers. She said aloud that it was "ridiculous" to plead guilty to a crime she did not commit.

Judge Kunzman, noting that Miss Frazier had been talking in court to a reporter, then said he would refuse to accept the guilty plea.

Kunzman said he would not accept a plea of guilty from a defendant who was protesting her innocence at the same time.

As a result, both the matters in Hayes' court and in Kunzman's court were continued to June 14. Kunzman said she would stand trial at that time.